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No. (1)

In The

Supreme Court of the United States

JERRY FITCH, SR.,

Petitioner,

v.

JOHNNY VALENTINE,

Respondent.

On Petition For A Writ Of Certiorari To The Mississippi Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Mississippi is one of only six states that retains the common law tort of alienation of affection. Long recognized as an antiquated means for judicial enforcement of traditionally endorsed marital arrangements and medieval notions of property, in practice its continued existence forms the predicate for judicially sanctioned exploitation, blackmail, fraud and extortion. In this case, the lower court entered judgment against Petitioner for $642,000 compensatory damages and $112,500 in punitive damages for conduct protected by the First Amendment and in contravention of the Due Process Clause of the Fourteenth Amendment. Whether the state may punish a defendant for lawful conduct protected by the First and Fourteenth Amendments is the question here presented.

PARTIES TO THE PROCEEDINGS

Petitioner Jerry Fitch, Sr., is an adult resident citizen of Holly Springs, Mississippi. Respondent Johnny Valentine is an adult resident citizen of Holly Springs, Mississippi.

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PETITION FOR A WRIT OF CERTIORARI

Jerry Fitch, Sr., respectfully petitions for a writ of certiorari to review the judgment of the Mississippi Supreme Court in this case.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court (App., *infra*, A) from which this petition seeks review is reported at 959 So.2d 1012, (Miss. 2007). The opinion of the Mississippi Supreme Court denying Petitioner's petition for rehearing is not reported (App., *infra*, B).

JURISDICTION

The decision of the Mississippi Supreme Court was entered on April 19, 2007. A petition for rehearing was denied on July 26, 2007 (App., *infra*, B). The mandate was issued on August 2, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution, in pertinent part, provides that "[c]ongress shall make no law . . . abridging the freedom of speech . . . [.]" U.S. Const. amend. I.

The Fourteenth Amendment, in pertinent part, provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT

A. Background

This case involves the question of whether and under what circumstances a state may punish legal acts of intimate association.

Respondent Johnny Valentine met his future wife, Sandra, in approximately 1989-90. Although Respondent had recently divorced, Sandra was still married and living with her then-husband when they began dating. Respondent and Sandra were married in 1993. From the start, the marriage was not ideal. Sandra complained about Respondent's frequent gambling, drinking and her abandonment. Despite repeated requests that he stop this behavior, it continued throughout their marriage. The couple had one child together. They were separated several times during the marriage.

Sandra started working at Jerry Fitch's business in the Spring of 1997. Sandra's marriage to Respondent had all but formally ended long before she went to work for Petitioner. By the Spring of 1998, she was on intimate terms with Mr. Fitch, initiating the relationship with him. Eventually, Respondent suspected

something was going on between Sandra and Mr. Fitch beyond an employee-employer relationship and asked Sandra to quit her job. She refused.

Sandra had a child on February 5, 1999. Respondent suspected that the child was not his shortly after Sandra became pregnant. He confronted her with his suspicions of her infidelity shortly thereafter and Sandra confirmed his suspicions.

In September 1999, Respondent had a DNA test done on the child born that year to determine if he was the father. After the results of the test proved the child was not fathered by him, Respondent tried to reconcile with Sandra, offering to raise the child as his own. Still, his wife would not quit her job with Petitioner, nor give up her relationship with Petitioner.

Respondent and Sandra separated in August 1999. In October, 1999, Respondent filed for divorce and the divorce was granted on grounds of adultery. The divorce was negotiated between Respondent's attorney, Petitioner's attorney and Petitioner. In the divorce, Sandra was given custody of the children, child support and the marital house. Respondent gave up the house and child in return for the admission of adultery, which he and his attorney needed to prosecute an alienation of affection claim.

Petitioner and Sandra were married in April 2002.[1]

B. The Proceedings Below

This action was commenced by Respondent Johnny Valentine seeking damages for the tort of alienation of affection against Petitioner Jerry Fitch, Sr. in the Circuit Court of Marshall County, Mississippi on December 21, 1999. The matter was tried to a jury on March 29-30, 2005. Judgment was entered on April 12, 2005 against petitioner in the amount of $642,000 actual damages and $112,500 in punitive damages, for a total award of $754,500. Petitioner's Motion for Judgment Notwithstanding the Verdict, for New Trial and for Remittitur was denied by the trial court on August 24, 2005. Notice of Appeal was filed on September 16, 2005. The Mississippi Supreme Court affirmed the verdict on April 19, 2007.

In rejecting Petitioner's due process claim,[2] Mississippi's highest court initially agreed with Respondent's argument that the due process claim

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[1] Ironically one reason Mississippi's high court found her testimony unbelievable.

[2] Petitioner argued below that Mississippi's interest in preserving the sanctity of marriage (Mississippi's traditional and long held rationale for preserving the tort, *e.g. Bland v. Hill*, 735 So.2d 414, 418 (Miss. 1999)) ended "when one is punished for engaging in action protected by the Constitution that incidentally may also cause the transfer of affections to one outside the marriage." *Valentine*, 959 So.2d at ¶ 43.

was procedurally barred. *Valentine*, 959 So.2d at ¶ 44. Reaching the merits nonetheless, the court construed the challenge to be general in scope or the position that Petitioner challenged the assessment of "punitive damages as a legitimate form of relief in alienation of affections cases."[3] The court completely overlooked, or chose not to address Petitioner's argument that "the penal component of the award below . . . offends substantive due process insofar as it sanctions punishment for constitutionally permissive conduct." *Id.* Instead, the court acknowledged Respondent's argument that punitive damages were appropriately awarded here when malice was presumed as a result of the adulterous relations between Petitioner and Respondent's then-wife.[4]

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[3] Despite the fact that Petitioner did not challenge the punitive damage award on proportionality grounds, the court looked at it this way. *See Valentine*, 959 So.2d at ¶ 44.

[4] *See Valentine*, 959 So.2d at ¶ 43:

> Valentine notes that this Court "has recognized punitive damages as proper relief in alienation of affection cases since *Brister v. Dunaway*, 149 Miss. 5, 115 So. 36 (1928). . . ." Moreover, he asserts that because adultery constitutes malice, *see Walter* [*v. Wilson*], 228 So.2d [597] at 598 [(Miss. 1969)] ("on the issue of adultery with the wife of another . . . malice is presumed."), then Miss. Code Ann. § 11-1-65(1)(a) is satisfied and "[t]he necessary elements were present for the jury to determine whether or not to grant punitive damages in this case."

A petition for rehearing was denied on July 26, 2007. The mandate was issued on August 2, 2007.

REASONS FOR GRANTING THE PETITION

This Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) leaves open the question of whether the right not to be punished by the state for engaging in intimate conduct unapproved by the sovereign, also precludes state sanctioned punishment of extra-marital conduct, part and parcel to a loving relationship, that meets all the criteria of protected intimate association within the meaning of *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

This Court's holding in *State Farm v. Campbell*, 538 U.S. 408 (2003), prohibits arbitrary deprivations of property through the mechanism of punitive damages. A punitive damage award based on a presumption of malice arising out of otherwise lawful conduct is an arbitrary deprivation of property.

ARGUMENT I: THE COURT SHOULD CLARIFY WHETHER THE CONDUCT UPON WHICH THIS PUNITIVE DAMAGE AWARD IS PREDICATED IS CONSTITUTIONALLY PROTECTED

This court has long recognized the personal liberty interests in jeopardy when a state actively

interferes in the consensual adult sexual activity of its citizens. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court signaled a new approach to evaluating such questions, determining that the Fourteenth Amendment provided a check to unwarranted state interference in the private lives of its citizenry.[5] Since that time, in varying degrees, this Court has identified a liberty interest worthy of Constitutional protection in a variety of settings that implicate exercise of the right of intimate association between consenting adults.[6]

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court affirmed its own prior conclusion "that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 617-18. The *Roberts* factors to be considered "include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Roberts*, 468 U.S. at 620, 104 S.Ct. 3244. Although in *Roberts*, this

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[5] *Griswold*, 381 U.S. at 484 (recognizing "zones of privacy" created by the guarantees found in the Bill of Rights).

[6] *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage rights); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage rights); *Moore v. East Cleveland*, 431 U.S. 494 (1977) (cohabitation with ones relatives); *Cary v. Population Serv. Intl.*, 431 U.S. 678 (1977) (contraception use).

Court was reviewing a challenge by the United States Jaycees to Minnesota's Human Rights Act, which prohibited discrimination based on gender in places of public accommodation, this Court has neither restricted the constitutional right of intimate association to large social organizations nor intimate relationships exclusively among family members. *See Board of Directors of Rotary Intl. v. Rotary Club of Duarte*, 481 U.S. 537, 545, 107 S.Ct. 1940 (1987).

The long relationship between Petitioner and Sandra Fitch, upon which the punitive damage award entered in this case was predicated, satisfy all of the *Roberts* criteria. Though adulterous, there was never any proof adduced that Petitioner had no real affection and love for Sandra during the relationship. The evidence was to the contrary.[7]

Petitioner developed a relationship with Sandra, fathered a child with her and provided for the child before the relationship between Sandra and Respondent formally came to an end. Though assuredly nontraditional, Petitioner and Sandra's relationship clearly created and fostered a *de facto* family unit:

> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of

[7] Ultimately, Sandra and Petitioner had a child together and married. They were married at the time of trial, and remain so now.

> thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

Roberts, 468 U.S. at 620.

The law of Mississippi regards the intimate association upon which the punitive damage award was predicated as "malicious." Moral abhorrence by the sovereign, however, is not a relevant consideration in determining whether the intimate association at issue is entitled to Constitutional protection. Petitioner submits he has made the requisite showing in the courts below that his relationship with Sandra at all relevant times was sufficiently imbued with the characteristics necessary to entitle him to state recognition of his privacy interests arising out of that relationship.[8]

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[8] The Mississippi Supreme Court predicated its upholding of the Mississippi tort of alienation of affections on the traditional interest in "protecting the marital relationship and its sanctity." Ironically, however, in doing so it failed to recognize that the upshot of the conduct at issue in this case was the

(Continued on following page)

In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court extended Constitutional protection to same-sex intimate relationships, recognizing the proposition that "individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Lawrence*, 539 U.S. at 574. This Court reasoned there can be conduct that it may not want to encourage or may not be "entitled to formal recognition in the law" but nevertheless "is within the liberty of person to choose without being punished." *Id.* at 567.

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ultimate creation of at least one happy and stable marriage, instead of one unhappy and unstable one. Moreover, as Justice Dickinson of the Mississippi Supreme Court stated in his concurring opinion:

> The theory that alienation actions must be retained as a means of preserving marriages and protecting families must fail for lack of support. While an admirable sentiment, these suits inevitably do more to hurt families than to help them. In my view, when a marriage has crashed and burned, the law should not provide an imprimatur to fan the coals of anger and resentment, extending further into the future the time when healing can begin.

Valentine, 959 So.2d 1012 at ¶ 68 (Dickinson, J., concurring) (opining that the alienation of affection tort should be abolished, but concurring in the judgment because it had not been). Justice Dickinson subsequently labeled the majority's assertion that the alienation of affections cause of action protects marriages "a fictional rationale" for preserving that tort. *Id.* at ¶ 78. Accordingly, the tort does nothing to achieve the state interest it purports to endorse.

In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), this Court considered whether a California statute, which created a presumption that a child born to a married woman who is living with her husband is a child of that marriage, violated the due process rights of the biological father. In holding the biological father did not have "a constitutionally protected liberty interest in his relationship with" his daughter, the court focused on the competing interests posed by potential disruption of an extant family unit:

> Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter.

Id. at 129.

In contrast with the appellant in *Michael H.*, Petitioner is not arguing an inviolate liberty interest in engaging in intimate associational activity in competition with an extant family unit. Nor is the assertion of his right to be free from punishment at odds with the state's interest in furthering the traditional family unit, a traditional justification for the underlying tort liability in such cases in Mississippi.

Rather, consistent with balancing of associational interests countenanced by *Roberts*, 468 U.S. at 620, Petitioner does not challenge Mississippi's right to maintain its antiquated cause of action; instead he

asserts only that it may not punish, as was done in this case, intimate association between two consenting adults. In other words, the State of Mississippi may not sanction the awarding of punitive damages on a presumption of malice arising from the exercise of intimate associational rights by consenting adults absent compelling justification. In this case, such justification cannot be shown.[9]

In his argument to the Mississippi Supreme Court, Petitioner conceded that "'the state has a legitimate interest in protecting the institution of marriage.'" *Valentine*, 959 So.2d at ¶ 42. Significantly, the Mississippi Supreme Court makes clear that the basis for the punitive damages award was "malicious act of adultery" itself. *Id.* at ¶ 43. Therefore, the punishment was for the intimate and private acts between Jerry Fitch and Sandra, not for the public interference with Sandra and Respondent's marital contract. This is an important distinction. Indeed, in his concurring opinion, Justice Dickinson argues that the comparison of alienation of affection with tortious interference with a contractual relationship is misplaced:

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[9] Petitioner here is not urging a prohibition on all attempts by the state to foster traditional forms of marital relationships nor suggesting that there exists a Constitutional right to adultery. Short term sexual liaisons, lacking the hallmarks of a deep intimate interpersonal component may be subject to state interference justified by less compelling reasons than should be manifest here.

> A claim of tortious interference with a contractual relationship is not comparable to a claim of alienation of affections. In contract suits, the aggrieved party can sue both the interferer and the other party to the contract. However, in alienation actions, the "other party" to the 'contract' is the spouse (whose affection was allegedly alienated from the plaintiff) who is not subject to suit, as in true contract cases. *Hoye* [*v. Hoye*], 824 S.W.2d [422 (Ky. 1992)] at 426. As the Kentucky Supreme Court pointed out, "[t]his logical asymmetry has prompted the majority of jurisdictions to eliminate these marital torts." *Id.*

Id. at ¶ 77.

The protection and fostering of traditional forms of marriage and family are still preserved (to the extent they can ever be)[10] in the heart balm tort upon which compensatory damages were awarded in this case. With an adequate remedy to aggrieved spouses in Mississippi, there is simply no rational basis for state sanctioned punishment of intimate association between consenting adults. Accordingly, the Mississippi Supreme Court should be reversed.

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[10] *See Bland, supra*, 735 So.2d at 418 ("We believe that the marital relationship is an important element in the foundation of our society. To abolish the tort of alienation of affections would, in essence, send a message that we are devaluing the marriage relationship.").

ARGUMENT II: THE ASSESSMENT OF PUNITIVE DAMAGES FOR CONSTITUTIONALLY PROTECTED CONDUCT IS AN ARBITRARY DEPRIVATION OF PROPERTY

In Mississippi, interference in the marital relations of another exposes the interloper to compensatory damages measured by the loss of consortium proved the result of the interference.[11] Punitive damages are allowable and presumed where an act of adultery is proven. *Walter v. Wilson*, *supra*, 228 So.2d at 598.[12]

In *State Farm v. Campbell*, 538 U.S. 408 (2003) this Court again recognized the perils inherent in punitive damage awards by civil juries, concluding that such awards "pose an acute danger of arbitrary deprivation of property." *State Farm v. Campbell*, 538 U.S. at 418. Relevant to the question here presented, this court stated:

> We recognized in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), that in our judicial system compensatory and punitive

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[11] *American Nat. Ins. Co. v. Hogue*, 749 So.2d 1254 (Miss. 1999) (Spouse's right of recovery on loss of consortium claim is limited to loss of society and companionship, interference with conjugal rights, and providing previously unnecessary physical assistance).

[12] *Overruled in part on other grounds, Saunders v. Alford*, 607 So.2d 1214, 1219 (Miss. 1992).

> damages, although usually awarded at the same time by the same decision maker, serve different purposes. *Id.*, at 432, 121 S.Ct. 1678. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Ibid.* (*citing* Restatement (Second) of Torts § 903, pp. 453-454 (1979)). By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. *Cooper Industries, supra*, at 432, 121 S.Ct. 1678; *see also* [*BMW of North America, Inc. v.*] *Gore,* [517 U.S. 559, 116 S.Ct. 1589, 134 L. Ed.2d 809 (1996)]at 568, 116 S.Ct. 1589 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence").

Id. at 416.

In the court below, the jury more than adequately compensated Respondent through the award of compensatory damages for the loss of consortium occasioned by Petitioner's interference with the marriage at issue in this case. Petitioner was then held liable to Respondent for punitive damages

predicated on his adulterous relationship[13] with Sandra Fitch, former wife of Respondent; current wife of Petitioner.

Although it is unclear whether the conduct upon which the punitive damage award is predicated (simple adultery) is or is not unlawful in Mississippi,[14] as argued previously, it is protected by the Constitution, nonetheless. State sanctioned penalties essentially directed at "no[thing] more than prohibit[ing] a particular sexual act," *Lawrence*, 539 U.S. at 568, constitutes an arbitrary deprivation of property redressable here. Because Mississippi has no legitimate interest in punishing Petitioner's conduct, the punitive damage award should be reversed in favor of Petitioner.

CONCLUSION

For the reasons set forth herein, the Court should grant Petitioner a writ of certiorari so that it may

[13] As pointed out by Mississippi's highest court, Respondent's punitive damage was predicated on something denominated "malicious adultery." *Valentine*, 959 So.2d at ¶ 44.

[14] Although a statute remains on the books to that effect. *See* Miss. Code Ann. § 97-29-1 (adulterous cohabiting), as recognized by *Saunders, supra*, 607 So.2d at 1220, there is no general crime of adultery in Mississippi nor has anyone apparently been prosecuted for many years. Prosecution seems less likely now subsequent to this court's decision in *Lawrence, supra*.

consider the question of whether the state of Mississippi, through the guise of its antiquated tort of alienation of affections, can punish a person for engaging in consensual intimate association without violating his First and Fourteenth Amendment rights.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2005-CA-01800-SCT

JERRY FITCH, SR.

v.

JOHNNY VALENTINE

DATE OF JUDGMENT:	04/12/2005
TRIAL JUDGE:	HON. ANDREW K. HOWORTH
COURT FROM WHICH APPEALED:	MARSHALL COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	DION JEFFERY SHANLEY S. DUKE GOZA
ATTORNEYS FOR APPELLEE:	MICHAEL ALFRED JACOB RALPH EDWIN CHAPMAN
NATURE OF THE CASE:	CIVIL-TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE
DISPOSITION:	AFFIRMED – 04/19/2007
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

RANDOLPH, JUSTICE, FOR THE COURT:

¶1. Before this Court today is a classic "he said"/"she said"/"the paramour said" case. It commenced when Johnny Valentine ("Valentine") filed a civil complaint against Jerry Fitch, Sr. ("Fitch") in the Circuit Court of Marshall County, Mississippi, averring various

causes of action, including alienation of affections. Valentine is a plumber, Fitch is a millionaire who owns various businesses, primarily involving oil and real estate.[1] At the conclusion of a trial on the merits, a jury unanimously rendered a verdict against Fitch and awarded Valentine $642,000 in actual damages and $112,500 in punitive damages. Thereafter, Fitch filed a consolidated motion for judgment notwithstanding the verdict, new trial, and remittitur, which the circuit court denied. Fitch has filed this appeal.

FACTS

¶2. The record reflects that Valentine and Sandra Day[2] ("Sandra") were married on February 12, 1993. In 1995, the couple had a son together, J.V. In the spring of 1997, Sandra began working as a realtor for the Fitch Realty division of Fitch Oil Company and earned around $400 a week in cash, based upon her commissions, according to Fitch.[3] Sandra testified that the adulterous affair with Fitch began in late 1997 or early 1998. According to Fitch, the relationship commenced in 1998. Fitch testified to knowing

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[1] An April 29, 1998, financial statement of Fitch revealed a net worth of nearly $22 million.

[2] Now Sandra Fitch, having married Fitch subsequent to her divorce from Valentine.

[3] Co-worker Susan Fleming, who was also a personal friend of Sandra and the former bookkeeper at Fitch Oil Company, testified that Sandra claimed she received only $500 a month in cash for her work.

that Sandra was married to Valentine and that the couple had a child together. It was established at trial that Fitch testified at his deposition that he did not care if his affair with Sandra might affect her marriage to Valentine.

¶3. Valentine testified that his marriage to Sandra was "normal" prior to late 1998 and early 1999. The couple shared a joint checking account, ate meals together, and engaged in sexual relations "[l]ike normal couples" until that time. In June of 1998, Sandra became pregnant. During the fall of 1998, Valentine suspected Sandra was having an affair, but she denied any such wrongdoing.[4] In February 1999, a daughter, K.V., was presumptively born to the marital union. Valentine testified that, at that time, he believed K.V. was his child. He was present at the hospital for K.V.'s delivery and was listed as K.V.'s father on her birth certificate; and he loved and cared for K.V. According to Valentine, "a few weeks after [K.V.] was born" he began to notice changes in Sandra.

¶4. At trial, Fitch testified that he was aware that K.V. was his child "a month or two after she was born[,]" even though in the divorce proceedings from his wife of thirty-five years, he admitted he knew K.V. was his child three or four days after her birth.

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[4] Conversely, Sandra testified that Valentine knew of her affair with Fitch at this time and knew that the child may have been Fitch's.

¶5. One night in August 1999, Sandra was not home by 10:30 p.m., and Valentine drove toward Fitch's cabin looking for her. After observing Sandra driving on Highway 4, Valentine flagged her down. Valentine testified that upon being confronted about an affair, Sandra once again denied any wrongdoing and came home with him. Thereafter, Valentine repeatedly requested that Sandra quit her job at Fitch Realty, but she consistently refused to do so. During this time frame, Valentine testified to finding "[t]wo or three hundred here and three or four hundred there, a thousand, $1,100 in different places" around their home. Sandra claimed she made this money at work. Valentine testified that the cash was more than he had previously observed her earning. Sandra's co-worker Susan Fleming testified that, prior to the divorce, Sandra told her that Fitch had given her $8,000 to buy a new Jeep Cherokee, which she acquired soon thereafter.[5] Fleming also testified that shortly after K.V. was born, Sandra told her that Fitch had purchased a baby bed, high chair, baby seat, baby clothes and other baby items for K.V. Fitch readily admitted to giving money to Sandra between February 1999 and August 1999. Fitch, however, testified that he never paid Sandra to date or marry him, or to entice her away from Valentine.

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[5] Valentine testified that Sandra came home with a new Jeep Cherokee and he had no idea where she obtained the funds to purchase it.

¶6. On August 28, 1999, Valentine and Sandra separated. In September 1999, DNA testing conclusively excluded Valentine as K.V.'s biological father. Nonetheless, Valentine still offered to raise K.V. as his own child if Sandra would end the adulterous affair with Fitch. Sandra refused.

¶7. Valentine filed for divorce on October 28, 1999, and the divorce decree was entered on November 23, 1999. The decree specifically stated that "[t]he evidence presented in open [c]ourt clearly establishes that [Valentine] is entitled to a divorce on the grounds of *adultery*." (Emphasis added). Prior to the divorce, Valentine testified that Sandra never told him that she did not love him or that she wanted a divorce. He further testified that the marriage failed because Sandra "couldn't resist all the money[,]" and that absent Fitch's interference, the marriage would have remained intact.

¶8. As can be expected, Sandra denied "selling [her] affections" and testified that her affections for Valentine were absent before the adulterous affair with Fitch commenced. According to her testimony, she loved Valentine when they first married. By the time J.V. was born, however, Sandra said the marriage was only "okay." She stated:

> [b]efore his gambling problem, Johnny loved to be with his buddies. He would not come home from work. He would drink. There's been occasions where I've gone looking for Johnny when he was with his buddies, and his remark was, I embarrassed him by coming to where

> he was to try to get him to come home to be the husband that he should be.[6]

Sandra further testified that, at that time, she "was still, obviously, in love with him. I tried to get him to change and be different, but . . . he didn't." Sandra said the breaking point came in January 1996, when she went to a casino looking for Valentine. She claims to have told him that if he did not leave the casino at that moment then their marriage was over. When he did not leave, Sandra states that "I didn't care if he went every night, and that's when our marriage was over[,]"[7] although she further testified that their sexual relationship did not effectively end until 1997 or 1998. According to Sandra, the couple "separated [on] several occasions about [gambling], and he would promise that he would get help, and he didn't. . . ." Valentine denied having a gambling problem or that the couple ever separated.

¶9. Sandra asserted that the adulterous relationship with Fitch, which she claims to have initiated, was caused by her unhappy marriage to Valentine. Furthermore, while she and Fitch engaged in sex two or three times a week, she maintained that the adulterous

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[6] Valentine denied drinking to an extent that it interfered with his marriage or job, and further testified that he did not recall Sandra confronting him about going out with his friends.

[7] Valentine testified that he did not recall Sandra confronting him about gambling in this, or any other, instance. Despite the claim that Valentine's gambling instigated Sandra's loss of affection, she failed to offer any evidence of gambling debts.

sexual activity had no effect on her alleged nonexistent desire to have sex with Valentine.

¶10. On December 21, 1999, Valentine filed suit against Fitch alleging various causes of action, including alienation of affections. In Fitch's answer, response to Valentine's first set of interrogatories, and response to Valentine's first set of requests for admission, filed when K.V. was more than one year old, Fitch *denied* having had sexual relations with Sandra, being the father of K.V., or giving Sandra any monetary support beyond her salary.[8]

¶11. Following trial, the jury unanimously found for Valentine and awarded him $642,000 in actual damages and $112,500 in punitive damages against Fitch. On April 12, 2005, the circuit court entered judgment against Fitch and in favor of Valentine "for the total sum of $754,500 and interest thereon in the amount of 8% per annum and all costs. . . ." Thereafter, Fitch filed his consolidated motion for judgment notwithstanding the jury verdict ("JNOV"), new trial, and remittitur. Following Valentine's response, Fitch's reply for the first time requested the circuit court to

[8] In amended responses filed six months later, on the day before his deposition, Fitch admitted to having sexual relations with Sandra and being the father of K.V.

abolish the tort of alienation of affections.[9] Following a hearing, the circuit court concluded that:

> [t]he jury's verdict . . . seemed to be a lot of money to me; but if I correctly instructed the jury on the elements of their damages and if the jury was entitled to consider once they arrived at a conclusion about liability, considered the elements that I instructed them on, *I can't second-guess them, don't have the authority to do so, don't want to do so. It's the jury's job to establish the value of the loss and they've done so and I cannot say the amount of the verdict is such to justify the Court granting the motion to remit the verdict.* The Court is going to deny all motions.

(Emphasis added). On September 16, 2005, Fitch filed his notice of appeal.

ISSUES

¶12. This Court will consider:

> (1) Whether the tort of alienation of affections should be abolished on public policy grounds.
>
> (2) Whether the circuit court committed evidentiary errors.

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[9] Valentine filed a motion to strike the portion of Fitch's reply addressing the abolition of the tort of alienation of affections. The circuit court granted Valentine's motion to strike.

(3) Whether the circuit court erred in instructing the jury.

(4) Whether the jury verdict was contrary to the overwhelming weight of the evidence.

(5) Whether the punitive damages award violates due process.

(6) Whether this Court should order a remittitur of the award in this case.

ANALYSIS

I. Whether the tort of alienation of affections should be abolished on public policy grounds.

¶13. Fitch argues that this Court should abolish the tort of alienation of affections as a matter of public policy. Fitch states:

> [t]he adversarial positions taken in this litigation over the intensely personal and private matters of [Valentine] and Sandra certainly does not serve as a shining example to the citizens of Marshall County that marriage as an institution must be preserved.

Fitch frames the trial as a "classic morality play" with "[t]he hapless victim; his wife's virtue stolen by the rich villain." Fitch contends that since the divorce rate continues to escalate in Mississippi, the institution of marriage has already been devalued and the justification for this tort's continued existence is outdated and discredited.

¶14. To the contrary, Valentine asserts that this Court "should continue to allow alienation of affection cases against third parties who cause the destruction and breakdown of the marital bond and family relationship." Valentine further contends that "[t]he focus of this Court should be to continue to allow the viability of the tort which imposes liability . . . [and deters third parties] from intentionally interfering with a marriage."

¶15. The tort of alienation of affections was recognized in Mississippi as early as 1926 in ***McRae v. Robinson***, 145 Miss. 191, 110 So. 504 (1926). In ***Camp v. Roberts***, 462 So. 2d 726, 727 (Miss. 1985), this Court held "[w]here a husband [wife][10] is wrongfully deprived of his rights to the 'services and companionship and consortium of his [her] wife [husband],' he [she] has a cause of action 'against one who has interfered with his [her] domestic relations.'" ***Id.*** at 727 (citing ***Walter v. Wilson***, 228 So. 2d 597, 598 (Miss. 1969), *overruled in part on other grounds*; ***Saunders v. Alford***, 607 So. 2d 1214, 1219 (Miss. 1992)). Without question, Mississippi's recognition of the tort of alienation of affections places it among the minority of states. *See* ***Helsel v. Noellsch***, 107 S.W.3d 231, 235 (Mo. 2003) (Benton, J., dissenting) (the other states are Illinois, Hawaii, New Mexico,

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[10] The tort of alienation of affections is equally applicable to women as men, avoiding any archaic notion that a wife is the property of her husband. *See* ***Kirk v. Koch***, 607 So. 2d 1220, 1224 (Miss. 1992).

North Carolina, South Dakota, and Utah). However, in his special concurrence in ***Bland v. Hill,*** 735 So. 2d 414 (Miss. 1999), Chief Justice (then Justice) Smith wisely responded to the "everybody else is doing it, so should I" view, by stating:

> [w]hile I agree that it appears society's moral values have changed during modern times, I do not believe Mississippi should get aboard this runaway train. I would also not take away an offended spouse's only legal means to seek redress in our courts for the wrongful conduct of a third party who wilfully and intentionally interferes in and aids in destroying a marriage.

Id. at 422 (Smith, J., specially concurring).[11]

¶16. In retaining the tort, this Court has stated that "the purpose of a cause of action for alienation of affection is the 'protection of the love, society, companionship, and comfort that form the foundation of a marriage. . . .'" ***Id.*** at 417 (quoting ***Saunders,*** 607 So. 2d at 1215). "The right sought to be protected is that of consortium." ***Saunders,*** 607 So. 2d at 1215. Justice Smith's special concurrence in ***Bland*** explained

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[11] I cannot adopt the position of a majority of states and minimize this activity which the legislature has defined as a crime against public morals and decency, and declared its penalty comparable to similar conduct between a teacher and pupil or a guardian and ward. *See* Miss. Code Ann. § 97-29-1 *et seq.* The Legislature has not seen fit to join the throngs who say these are only "affairs of the heart," "flings," or "stepping out," as a means of attaching validity to such conduct.

the justification and need for continued recognition of the tort of alienation of affections, stating:

> [s]hould an individual be allowed to intrude upon a marriage to such an extent as to cause it to come to an end? Does a spouse have a valuable interest in a marriage that is worthy of protection from the intruding third party? In my view, the answer to both questions is in the affirmative. *The traditional family is under such attack both locally and nationally these days that this Court should not retreat now from the sound view of the tort of alienation of affections espoused by this Court in* ***Saunders*** *as entitling a spouse to "protection of the love, society, companionship, and comfort that form the foundation of a marriage."* [***Saunders***, 607 So. 2d at 1215] (quoting ***Norton v. Macfarlane***, 818 P.2d 8, 12 (Utah 1991)); *see also* ***Horner v. Byrnett***, 511 S.E.2d 342 (N.C. Ct. App. 1999). I do not believe that under the compelling facts of this particular case this Court should hold that the doctrine of alienation of affections has outlived its usefulness as a deterrent protecting the marital relationship of a husband and wife in cases where the facts clearly warrant.

Bland, 735 So. 2d at 422 (Smith, J., specially concurring) (emphasis added). In addition to protecting the marriage relationship and its sanctity, *see* ***id.*** at 418, the tort of alienation of affections also provides an appropriate remedy for intentional conduct which

causes a loss of consortium. The dissenting opinion in ***Helsel*** summarized this position, stating:

> [i]n tort cases where a spouse is injured, the other spouse often has a separate claim for loss of consortium. ***Powell v. American Motors Corp.***, 834 S.W.2d 184, 188 (Mo. banc 1992). Most of these losses are caused by a defendant's negligence. In alienation of affection – an intentional tort – a defendant's intentional conduct causes the loss. *See* ***Gibson*** [***v. Frowein***,] 400 S.W.2d [418,] 421 [(Mo. banc 1966)]. It is inconsistent [if] the law compensates for negligent conduct causing a loss of consortium, but . . . does not compensate for intentional conduct causing the same loss.

Helsel, 107 S.W.3d at 234 (Benton, J., dissenting). *See also* ***Bland***, 735 So. 2d at 421 (Smith, J., specially concurring) ("there is no point in abolishing an otherwise valid common law tort, especially now that we have leveled the playing field in ***Kirk***. Would the dissent strike down *consortium* next?"). Therefore, in the interest of protecting the marriage relationship and providing a remedy for intentional conduct which causes a loss of consortium, this Court declines the invitation to abolish the common law tort of alienation of affections in Mississippi.[12] Alienation of

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[12] One dissent suggests that "these suits inevitably do more to hurt families than to help them." I find more persuasive the counter-argument that damage actually arises from the adulterous conduct which first violates, and then destroys, the trust of

(Continued on following page)

affections is the only available avenue to provide redress for a spouse who has suffered loss and injury to his or her marital relationship against the third party who, through persuasion, enticement, or inducement, caused or contributed to the abandonment of the marriage and/or the loss of affections by active interference.

II. Whether the circuit court committed evidentiary errors.

(A) The use of Fitch's prior inconsistent statements, set forth in the pleadings, during Valentine's opening statement.

¶17. In Valentine's opening statement, his counsel discussed the charges contained in the complaint and Fitch's various responses found in his answer, answers to interrogatories, and responses to requests for admissions which set forth Fitch's repeated denials of having sexual relations with Sandra or being the father of K.V. Counsel for Fitch objected to the pleadings being referenced in Valentine's opening statement, arguing "they are not proof or evidence." The circuit judge overruled Fitch's objection.

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not only the participants, but also of their respective families. To minimize and cast as theoretical the obvious negative consequences, such as the erosion of the marital relationship and the disruption to family unity ignores these empirical truths. The dissent's fatalistic presupposition that marriages experiencing affairs will "crash and burn," fails to recognize the reality of forgiveness and reconciliation.

¶18. Fitch now contends that the circuit court erred, maintaining that "argument and comments upon the credibility of witnesses are improper when made in opening statement." In support thereof, he cites ***Balfour v. State***, 598 So. 2d 731, 749-50 (Miss. 1992), for the proposition that "before there can be impeachment, there must be testimony which is impeachable." According to Fitch, Valentine:

> proceeded to publish to the jury what he obviously considered passed for a predicate from which impeachment may commence: unsworn allegations of the [c]omplaint, unsworn denials in the [a]nswer. From here, [Valentine] proceeded with the 'testimony' – answers to interrogatories, deposition testimony, and responses to request for admissions. . . . [Fitch] had not taken the stand.

In Fitch's estimation, "the unsworn allegations were blown up and published to the jury obviously disproportionate to their significance . . . in light of the fact that many claims were abandoned in subsequent testimony." As such, Fitch contends that this error warrants a new trial.

¶19. In response, Valentine first submits that Fitch has waived this issue as he "only objected to [Valentine's] use of the unsworn pleadings on the basis for use as evidence[,]" but never objected "to the use of the unsworn pleadings on the basis of impeachment, which is the issue [Fitch] is raising on appeal." *See* ***Johnson v. Alcorn State Univ.***, 929 So. 2d 398, 407 (Miss. Ct. App. 2006) ("[a]ppellate courts may not rule

upon material matters which the trial judge did not have the opportunity to judge. ***Ditto v. Hinds County, Miss.***, 665 So. 2d 878, 880 (Miss. 1995). Issues not raised at trial cannot be raised on appeal. ***Southern v. Mississippi State Hosp.***, 853 So. 2d 1212 (Miss. 2003).").

¶20. Notwithstanding the alleged procedural bar, Valentine maintains that the prior inconsistent statements:

> were not being introduced during [Valentine's] opening statement as substantive evidence nor were they being 'offered for the truth of the matter asserted' but the pleadings were being used merely to define the issues the jury would decide and show [Fitch] made the statements and as such it is relevant regardless of its truth and it does not matter that the trier of fact is unable to ascertain [Fitch's] credibility.

In support of this position, Valentine notes that both his counsel and the circuit court informed the jury that the substance of the opening statement did *not* constitute evidence. Moreover, Valentine asserts that the pleadings "were used as demonstrative aids only . . . to describe the issues that the jury would decide, [Fitch's] defenses and that [Fitch] had made prior inconsistent statements." In ***Haggerty v. Foster***, 838 So. 2d 948 (Miss. 2002), this Court stated:

> [d]emonstrative evidence may be admitted at the trial court's discretion, if such evidence was reasonably necessary and material,

> ***Murriel v. State***, 515 So. 2d 952, 956 (Miss. 1987), and appropriate and relevant. ***Gandy v. State***, 373 So. 2d 1042, 1047 (Miss. 1979). Furthermore, where error involves the admission or exclusion of evidence, this Court "will not reverse unless the error adversely affects a substantial right of a party." ***In re Estate of Mask***, 703 So. 2d 852, 859. . . .

Haggerty, 838 So. 2d at 958. Valentine argues that "this evidence was necessary, material, appropriate, and relevant since [Fitch] testified that he provided information to his counsel to be used in answering the [c]omplaint." Finally, Valentine insists that "this reference was cumulative of other and later similar denials, under oath, in response to both interrogatories and requests for admissions (which were also sworn) and if error at all, it was harmless."

¶21. The circuit judge's decision to overrule Fitch's objection is reviewed by this Court under an "abuse of discretion" standard. *See* ***id.*** This Court finds that the use of Fitch's prior inconsistent statements in Valentine's opening statement was permissible and the circuit court's decision to overrule Fitch's objection was not an abuse of discretion. Not only was the jury repeatedly informed that the content of the opening statements were not evidence, but Fitch's prior inconsistent statements in these pleadings were developed during his testimony at trial. Accordingly, this issue is without merit.

(B) Evidence of Valentine's conduct prior to and after his marriage to Sandra.

¶22. Fitch sought to solicit testimony regarding Valentine's adulterous conduct with Sandra at the inception of their relationship. Valentine filed a motion in limine to prevent Fitch from introducing any such evidence. The circuit judge granted Valentine's motion in limine. In support of that position, the circuit judge stated that "if you have any evidence of . . . relevant marital misconduct on his part while he's married to [Sandra], that's one thing. *Proof beforehand is something else.*" (Emphasis added).

¶23. "[T]he standard of review regarding Rule 403 determinations is an 'abuse of discretion.'" ***Baldwin v. State***, 784 So. 2d 148, 160 (Miss. 2001). Applying that deferential standard of review, this Court finds that the circuit court did not abuse its discretion in granting Valentine's motion in limine. Fitch's wrongful conduct was the issue in this case. The presence of a marriage relationship is necessary for the tort of alienation of affections to apply. Therefore, the time frame in which Valentine and Sandra were married, not their pre-marriage conduct, was key. The meager probative value of evidence on the beginning of Valentine's relationship with Sandra was found to be outweighed by the undue prejudice it would create. As such, the circuit court did not abuse its discretion in granting Valentine's motion in limine, and this issue is without merit.

¶24. At trial, Valentine objected to Fitch mentioning another child born to Valentine following his divorce from Sandra. The circuit court precluded the introduction of such evidence, finding that "you should not inquire as to any after born children, if that's a correct term for it because that, in the Court's opinion, is *unduly prejudicial and of limited or no probative value.*" (Emphasis added).

¶25. Once again, this Court applies the deferential abuse of discretion standard of review, *see* ***id.***, and finds that the circuit court did not abuse its discretion in precluding the introduction of evidence regarding the child born to Valentine following his divorce from Sandra. The key time frame for the tort of alienation of affections is that of the marriage, within which this evidence clearly does not fit. Moreover, the circuit court found this evidence to be "unduly prejudicial and of limited or no probative value." As the circuit court did not abuse its discretion in so finding, this issue is without merit.

III. Whether the circuit court erred in instructing the jury.

(A) Instructions P-5 and D-8.

¶26. Instruction P-5 was given to the jury by the circuit court and provided:

> [i]n order for your verdict to be for [Valentine] and against [Fitch], you must find the following:

> 1. That the conduct of [Fitch] was wrongful;
>
> 2. A loss of affection or consortium was suffered by [Valentine]; and
>
> 3. That this wrongful conduct caused the loss of affection or consortium.
>
> If you determine the above statements to be true, yo[u] must return a verdict for [Valentine] and award him damages in accordance with the Court's instructions.
>
> If [Valentine] fails to prove any one or more of these elements by a preponderance of the evidence, then your verdict must be for [Fitch].

Instruction D-8, which was rejected by the circuit court as "repetitive," stated "[y]ou are instructed that in determining the cause of the loss of Sandra's affections [Valentine] must prove, by a preponderance of the evidence, that [Fitch's] direct interference in his marriage caused Sandra to lose affections for him."

¶27. While conceding that Mississippi law has commonly listed the elements of the tort of alienation of affections just as in Instruction P-5, *see* ***Saunders***, 607 So. 2d at 1215, Fitch argues that:

> as far back as ***Stanton v. Cox***, 139 So. 458, 461 (1932), it is settled law that [Valentine] must prove [his] loss was occasioned by the direct interference of [Fitch]. Because the lower court's instruction allowed the jury to

> find liability without the predicate finding of proximate cause specific to this tort, the matter should be reversed for a new trial. . . .

¶28. In response, Valentine initially contends that Fitch waived this argument because "[t]o preserve an objection to a jury instruction, the specific ground for the objection must be stated in the original objection. The issue raised on appeal may not be based on a different legal theory." *See* ***Shields v. Easterling***, 676 So. 2d 293, 296 (Miss. 1996) ("Shields did *not* put this objection to the trial court *in any specific meaningful manner.* Thus, the trial judge had no opportunity to rule on it. . . . Thus, this Court is *barred* from reviewing this issue.") (emphasis added). At trial, Fitch objected to Instruction P-5 initially because he perceived the wording to be "cumbersome." Once the language was rephrased, Fitch raised no further objection. As to Instruction D-8, the circuit judge refused the instruction "because i[t] becomes somewhat repetitive." According to Valentine, Fitch has failed to show that Instruction D-8 "properly stated the law and was necessary to fully inform the jury of the law considering the totality of the instructions[.]"[13]

¶29. This Court has stated that it "[i]f other instructions granted adequately instruct the jury, a party may not complain of a refused instruction on appeal.

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[13] Fitch replies that "[i]f the trial court was correct in finding D-8 repetitive of P-5 . . . [then Fitch] loses this point on the merits, not on a point of procedure."

Purina Mills, Inc. v. Moak, 575 So. 2d 993, 996 (Miss. 1990). . . . [T]he trial court has considerable discretion in instructing the jury." ***Southland Enter. v. Newton County,*** 838 So. 2d 286, 289 (Miss. 2003). This Court first finds this argument to be procedurally barred as Fitch failed to object after Instruction P-5 was rephrased and therefore failed to properly preserve for appeal his Instruction D-8 argument. Procedural bar notwithstanding, this Court concludes that the circuit court properly exercised its discretion in finding Instruction D-8 "repetitive" of Instruction P-5. Therefore, this issue is without merit.

(B) Instruction P-8

¶30. Instruction P-8 was given to the jury by the circuit court and provided:

> [y]ou are instructed that just compensation is a decision to be made by the jury. Your discretion as to the measure of damages is wide, but not unlimited, and you may not act arbitrarily. Exercise your discretion as to the amount of damages reasonably, intelligently and in harmony with the evidence of the case and the Court's instructions. The damages cannot be assessed by an fixed rule, but you are the sole judges as to the measure of damages in this case.
>
> Should you find for [Valentine] then you must determine the amount of money which will reasonably and fairly compensate him

> for the value of the consortium he has lost. You should consider the following elements of damage as have been proved by a preponderance of the evidence in this case:
>
> a. The loss of society, companionship, love and affection;
>
> b. The loss of aide, services, and physical assistance provided by [Sandra];
>
> c. The loss of sexual relations;
>
> d. The loss of participation together in the activities, duties and responsibilities of making a home;
>
> e. Any mental and emotional distress proximately resulting from [Fitch's] conduct; and
>
> f. Any other damages proven to have proximately resulted from any wrongful act of [Fitch].

¶31. Fitch cites ***Cousar v. State***, 855 So. 2d 993 (Miss. 2003), for the proposition that "[g]ranting instructions not supported by evidence is error." ***Id.*** at 997 (citing ***Haggerty***, 838 So. 2d at 955). Fitch then argues that the circuit court erred by approving "an instruction on damages which the evidence did not support, specifically allowing the jury to consider an award for any damage the jury thought appropriate despite the fact that [Valentine], on evidentiary grounds, abandoned all damages beyond the consortium lost with

his wife and child."[14] Furthermore, Fitch contends that "[t]here is no temporal restrictions placed on the instruction. . . . These questions were significant insofar as [Valentine] continually prevented [Fitch] from going into matters that preceded or followed the marriage."

¶32. In response, Valentine maintains that:

> [t]emporal restrictions were placed both on types of damages recoverable and as to what period of time the jury should consider since the jury was instructed to only award damages proven during the course of the trial to have proximately resulted from the wrongful acts of [Fitch]. The jury heard the evidence presented and unanimously determined the amount of damages that were proximately caused *by [Fitch's] wrongful acts.*

(Emphasis added). Furthermore, Valentine notes that "[t]he instructions must be read as a whole[,]" ***Phillips v. Dow Chemical Co.***, 247 Miss. 293, 304, 151 So. 2d 199, 203 (1963); Court Instruction No. 4 provided that any damages were to be proven by a preponderance of the evidence; and "it is and should be presumed that the jury followed the law."

¶33. This Court "must view the instruction in light of all the other instructions which were given to

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[14] Fitch alleges that Valentine did this "to prevent examination of [himself] on issues relating to his adventures after his marriage to Sandra ended."

determine whether the jury was properly instructed. ***Munford, Inc. v. Fleming***, 597 So. 2d 1282, 1286 (Miss. 1992). . . . [T]he trial court has considerable discretion in instructing the jury." ***Southland Enter.***, 838 So. 2d at 289. Instruction P-8 stated "[y]ou should consider the following elements of damages as have been proved by a *preponderance of the evidence* in this case[.]" (Emphasis added). As such, the damages awarded were limited to those proximately resulting from Fitch's wrongful acts during Valentine and Sandra's marriage. Granting such an instruction was proper and well within the circuit judge's discretion. Therefore, this issue is without merit.

IV. Whether the jury verdict was contrary to the overwhelming weight of the evidence.

¶34. At the hearing on his post-trial motion for JNOV, Fitch argued that:

> because the plaintiff had not established the second element of the tort of alienation of affection [loss of affection or consortium] or a causal connection . . . between the defendant, [Fitch], as conduct and the disintegration of this marriage, a jury issue was not presented and we would contend that a directed verdict should have been granted.

In response, Valentine maintained that:

> [w]hile they have one set of facts and proof, we had another. The jury chose to believe our facts. It was a classic case of where the jury

> made a decision and in this case they made it *unanimously.* There was proof on both sides of it. We proved wrongful conduct. We proved loss of affection. We proved the causal connection. We proved loss of love and affection through our client.

(Emphasis added). After hearing argument from both parties, the learned circuit judge denied the JNOV motion.

¶35. A trial court's denial of a motion for JNOV is reviewed de novo by this Court. ***Poole v. Avara***, 908 So. 2d 716, 726 (Miss. 2005) (citing ***Wilson v. Gen. Motors Acceptance Corp.***, 883 So. 2d 56, 64 (Miss. 2004)). "The trial court must view the evidence *in the light most favorable to the non-moving party* and look only to the *sufficiency,* and not the weight, of that evidence." ***Poole***, 908 So. 2d at 726 (emphasis added). "When determining whether the evidence was *sufficient,* the critical inquiry is whether the evidence is of such quality that *reasonable and fairminded jurors in the exercise of fair and impartial judgment* might reach different conclusions." ***Id.*** (citing ***Jesco, Inc. v. Whitehead***, 451 So. 2d 706, 713-14 (Miss. 1984) (Robertson, J., specially concurring)) (emphasis added). *See also* ***Irby v. Travis***, 935 So. 2d 884, 888-89 (Miss. 2006).

¶36. The commonly stated elements of the tort of alienation of affections are "(1) wrongful conduct of

the defendant; (2) loss of affection or consortium;[15] and (3) causal connection between such conduct and loss." ***Saunders***, 607 So. 2d at 1215. *See also* ***Camp***, 462 So. 2d at 727 ("where a husband [wife] is wrongfully deprived of his [her] rights to the 'services and companionship and consortium of his [her] wife [husband],' he [she] has a cause of action 'against the one who has interfered with his [her] domestic relations.' . . . The husband [wife] might then sue for . . . alienation of affection. . . ."). This Court has recognized that persuasion, enticement, or inducement which causes or contributes to the abandonment is a necessary component of "wrongful conduct." Justice Dickinson recognized in ***Children's Medical Group v. Phillips***, 940 So. 2d 931 (Miss. 2006) that in order "to maintain this action it *must* be established that the husband [wife] was *induced* to abandon the wife

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[15] Regarding loss of consortium:

> [t]he interest sought to be protected is personal to the wife [husband] and arises out of the marriage relation. She [He] is entitled to society, companionship, love, affection, aid, services, support, sexual relations and the comfort of her husband [his wife] as special rights and duties growing out of the marriage covenant. To these may be added the right to live together in the same house, to eat at the same table, and to participate together in the activities, duties and responsibilities necessary to make a home. All of these are included in the broad term, 'conjugal rights.' The loss of consortium is the loss of any or all of these rights. . . .

Kirk, 607 So. 2d at 1224 (citing ***Tribble v. Gregory***, 288 So. 2d 13, 16 (Miss. 1974)).

[husband] by some active interference on the part of the defendant." ***Id.*** at 934 (quoting ***Stanton***, 139 So. at 460) (emphasis added). In recognizing this he identified pre-***Stanton*** language requiring persuasion. *See* ***McRae***, 145 Miss. at 205, 110 So. at 508. Thus, to determine whether this standard was met, following denial of the JNOV motion, this Court must view the evidence "in the light most favorable to the non-moving party[,]" ***Poole***, 908 So. 2d at 726, and it must be determined if "reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions[,]" ***id.***, as to that evidence.

¶37. As a preliminary matter, the credibility of a witness is to be judged by the jury. *See Bland*, 735 So. 2d at 419. Viewing the credibility evidence regarding Fitch and Sandra "in the light most favorable," ***Poole***, 908 So. 2d at 726, to Valentine, it is clear that a reasonable juror could reject or discount their testimony.

¶38. Under oath and in response to Valentine's first set of interrogatories and requests for admission,[16] Fitch denied both that he fathered K.V. and that he had any sexual relations with Sandra. At the time of this response, K.V. was more than one year old. At trial, Fitch testified that he knew the child was his "a month or two after she was born." At the time he responded under oath to Valentine, Fitch was well

[16] As well as in his answer.

aware that K.V. was his child. In spite of this, Fitch denied being K.V.'s father and having any sexual relations with Sandra.

¶39. As to Sandra, when she was pregnant with K.V. in the fall of 1998, during her second trimester of pregnancy, she falsely denied to Valentine that she was having an affair with Fitch. At trial, she stated that her affair with Fitch commenced in late 1997 or early 1998. Furthermore, Sandra subsequently married Fitch, and, as Fitch's wife, her testimony at trial in support of Fitch's position could justifiably be questioned.[17]

¶40. Furthermore, viewing the testimony and evidence presented at trial "in the light most favorable," ***id.***, to Valentine, a reasonable juror could conclude that all elements of the tort of alienation of affections were met. The "wrongful conduct of the defendant," ***Saunders***, 607 So. 2d at 1215, when viewed "in the light most favorable," ***Poole***, 908 So. 2d at 726, to Valentine, was satisfied by introduction of evidence supporting a finding that Fitch's acts of persuasion, enticement, or inducement caused or contributed to an adulterous relationship between Fitch and Sandra, which subsequently was admitted. The judgment of divorce provided that "[t]he evidence presented in open [c]ourt clearly establishes that

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[17] At trial, Sandra admitted to discussing the lawsuit with Fitch. Regarding potential motive, counsel for Valentine stated, "they eat out of the same trough."

[Valentine] is entitled to a divorce on the grounds of adultery."[18] Furthermore, Valentine testified that after K.V. was born he began finding large sums of money throughout the home, which Sandra claimed to have made at work. The amount of cash he found far exceeded what he had previously observed Sandra earning. Fitch testified to giving Sandra money between February 1999 and August 1999. Moreover, Fleming testified that Sandra told her she was given $8,000 by Fitch with which to buy a new Jeep Cherokee. Soon thereafter, Sandra acquired a new Jeep Cherokee. Finally, Fleming testified that Sandra told her "that if she did quit [working for Fitch], she was afraid that Mr. Fitch would have [the child] taken away from her." Valentine testified his marriage failed because Sandra "couldn't resist all the money[,]" and, absent Fitch, his marriage would have remained intact. This satisfies the additional element of persuasion, enticement, or inducement, when viewed "in the light most favorable," to Valentine. ***Poole***, 908 So. 2d at 726. The key issue is the "causal connection between such conduct and loss." ***Id.*** In short, when did the loss of society, companionship, aid, services, support, and the remaining components of loss of affection and consortium occur? *See* ***Kirk***, 607 So. 2d at 1224. Was it before or after Sandra became involved with Fitch? If after, did Fitch's wrongful conduct lead to Sandra's loss of affection or consortium?

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[18] Furthermore, Sandra admitted at trial that she committed adultery with Fitch.

Again, the testimony must be viewed "in the light most favorable," to Valentine. ***Poole***, 908 So. 2d at 726. Even though the marriage may have been "on the rocks," there is no proof that aid, services, support, or the right to live in the same house and eat at the same table had been lost until after the wrongful conduct, even though Sandra asserted that she lost affection for Valentine in January of 1996. Around that time, she allegedly went to the casino, told Valentine that if he did not leave with her their marriage was over, and he did not leave. From that point on, which predated her introduction to Fitch, she claims not to have "care[d] if he went every night, and that's when our marriage was over." However, Valentine testified that, prior to K.V.'s birth, his marriage to Sandra, while not perfect, was "normal." He stated that they had regular sexual relations[19] prior to K.V.'s birth, shared a joint checking account, ate meals together, never separated,[20] and that he loved Sandra. Only after K.V. was born did Valentine begin to notice changes in Sandra. The "loss of affection or consortium," ***id.***, was unquestionably present.

¶41. After considering the evidence, the jury *unanimously* found for Valentine in the amount of $642,000 in actual damages and, thereafter, for $112,500 in punitive damages. In light of the credibility issues surrounding both Fitch's and Sandra's testimony and

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[19] "Like normal couples."

[20] Sandra further testified that she never filed for divorce from Valentine.

the standard of review which mandates viewing the evidence "in the light most favorable," to Valentine, "reasonable and fairminded jurors . . . exercis[ing] . . . fair and impartial judgment," could (and unanimously did) find Fitch liable for the tort of alienation of affections. ***Id.*** Out of respect for the judgments of both the jury and circuit judge, this Court concludes that "[c]onflicting evidence exists which could cause fair-minded jurors to reach different conclusions and thus, granting this motion would have been improper. Therefore, this issue is without merit." ***Id.***

V. Whether the punitive damage award violates due process.

¶42. Fitch concedes that "[u]nder the current state of jurisprudence in Mississippi, the state has a legitimate interest in protecting the institution of marriage" and the love that forms its foundation. Nonetheless, he argues that such interest ends "when one is punished for engaging in action protected by the Constitution that incidentally may also cause the transfer of affections to one outside the marriage." Therefore, he maintains that "the penal component of the award below . . . offends substantive due process insofar as it sanctions punishment for constitutionally permissive conduct."

¶43. In reply, Valentine first argues that Fitch waived this argument by only generally objecting to

punitive damages at trial[21] and not seeking remittance of the punitive damage award in post-trial motions. Notwithstanding the procedural bar, Valentine notes that this Court "has recognized punitive damages as proper relief in alienation of affection cases since ***Brister v. Dunaway***, 115 So. 36 (Miss. 1928). . . ." Moreover, he asserts that because adultery constitutes malice, *see* ***Walter***, 228 So. 2d at 598 ("on the issue of adultery with the wife of another . . . malice is presumed."), then Miss. Code Ann. Section 11-1-65(1)(a)[22] is satisfied and "[t]he necessary elements were present for the jury to determine whether or not to grant punitive damages in this case." In total, Valentine maintains that:

> [t]his malicious act of adultery was . . . admitted on the stand. Further, other aggravating circumstances also existed in the case sub judice: i.e., by the continuing acts of

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[21] Specifically, Valentine argues that Fitch "only objected to the jury instruction on punitive damages to the extent it had a presumption of malice. This presumption was redacted from the instruction. [Fitch] then only made a general objection to punitive damages." While Fitch admits that he "did not urge a First Amendment-based theory of relief against the punitive damage award[,]" he still maintains that he raised due process claims in the circuit court regarding "the 'excessiveness of the verdict' as well as the cumulative errors. . . ."

[22] Which states "[p]unitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with *actual malice*, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." (Emphasis added).

> adultery occurring two to three times a week during work and occasionally at night over an extended period of time; by a child fathered by [Fitch] during Sandra's marriage to [Valentine]; and by the exorbitant and lavish sums of money, gifts, and benefits which [Fitch] gave to Sandra, his employee, during her marriage to [Valentine].

¶44. As an initial matter, this Court finds that this issue is procedurally barred as no due process challenge to the punitive damage award was raised before the circuit court. *See* ***Johnson***, 929 So. 2d at 407. Procedural bar notwithstanding, this Court has consistently recognized punitive damages as a legitimate form of relief in alienation of affections cases. *See* ***Brister***, 115 So. at 36. Moreover, the punitive damages awarded in the case sub judice were only a fraction of compensatory damages awarded,[23] hardly rising to the level of gross excess. In total, this issue is without merit.

VI. Whether this Court should order a remittitur of the award in this case.

¶45. As to damages, Circuit Judge Howorth considered a motion to remit the verdict and concluded:

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[23] The punitive damage award constituted less than 15% of the total award. The United States Supreme Court has noted that "single-digit multipliers are more likely to comport with due process." ***State Farm Mut. Automobile Ins. Co. v. Campbell***, 538 U.S. 408, 425 (2003).

> [t]he jury's verdict . . . seemed to be a lot of money to me; but if I correctly instructed the jury on the elements of their damages and if the jury was entitled to consider once they arrived at a conclusion about liability, considered the elements that I instructed them on, *I can't second-guess them, don't have the authority to do so, don't want to do so. It's the jury's job to establish the value of the loss and they've done so and I cannot say the amount of the verdict is such to justify the Court granting the motion to remit the verdict.*

(Emphasis added).

¶46. Miss. Code Ann. Section 11-1-55 states, in part:

> [t]he supreme court or any other court of record in a case in which money damages were awarded may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence.

Miss. Code Ann. Section 11-1-55 (Rev. 2002). This Court has stated that "[a]bsent either of these findings, the trial court abuses its discretion[,]" in ordering a remittitur. ***State Highway Commission of Miss. v. Warren***, 530 So. 2d 704, 707 (Miss. 1988) (quoting ***McIntosh v. Deas***, 501 So. 2d 367, 369-70 (Miss. 1987)).

¶47. Fitch initially admits that "the verdict was based on [Valentine's] testimony concerning the distress caused by the breakup of his marriage and . . . that expert testimony is *not required* to prove such elements." (Emphasis added). Nonetheless, he argues that:

> [Valentine] suffered no economic loss in this case that was quantified with certainty sufficient to support the award. . . . Such a verdict is so obviously excessive as to demonstrate without further argument, bias, passion and prejudice on the part of the jury. The verdict should be set aside. . . .

¶48. Valentine responds that the jury verdict was unanimous and that "[t]he evidence presented by [Valentine] supported the jury's finding that [he] suffered a loss of consortium and affection, and mental and emotional distress because of [Fitch's] wrongful acts." Specifically, he argues that:

> [t]he proof established that [Valentine] suffered not only from the alienation of Sandra's affection, but the damages and losses he sustained as a result of his marital household divided. [Valentine] continues to suffer from the effects of not only losing the affection of Sandra, but also from the effects of losing [K.V.] who he thought was his daughter and who he raised as his daughter and from losing his right to be a full time father of his son, [J.V.], all as a result of [Fitch's] wrongful and intentional acts.

Furthermore, "[i]f there was bias or prejudice, the punitive verdict would have been much larger, particularly when [Fitch's] list of assets reflected aggregate assets of at least [$18,639,750]."

¶49. The trial judge's decision on the denial or acceptance of an additur or remittitur is reviewed by this Court for abuse of discretion. ***Ross-King-Walker, Inc. v. Henson,*** 672 So. 2d 1188, 1193-94 (Miss. 1996). The evidence in this case, viewed "in the light most favorable," ***Poole,*** 908 So. 2d at 726, to Valentine establishes that Valentine lost: his home;[24] physical custody of J.V.;[25] his marriage and the society, companionship, aid, services, support and other components of affection and consortium attached thereto; and K.V., the child he believed to be, and raised as, his daughter. As the circuit judge found, the jury establishes the value of the loss suffered by Valentine. They determined he was entitled to $642,000 in actual damages and $112,500 in punitive damages, and the judge concluded that the amount of the verdict did not justify remittitur. There being no evidence that either "(1) the jury or trier of fact was influenced by bias, prejudice, or passion, or (2) the . . . damages were contrary to the overwhelming weight of the evidence[,]" ***Entergy Miss., Inc. v. Bolden,***

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[24] He sold his interest in the house to Sandra "because [he] wanted a place for [J.V.] to live."

[25] He gave Sandra physical custody of J.V. because "[he] loved [K.V.]. I was not going to split them up and do that to him."

854 So. 2d 1051, 1058 (Miss. 2003), this Court finds that the circuit court did not abuse its discretion in denying remittitur and the jury verdict should be affirmed.

CONCLUSION

¶50. Based upon the aforementioned analysis, this Court affirms the judgment of the Circuit Court of Marshall County entered against Fitch and in favor of Valentine "for the total sum of $754,500 and interest thereon in the amount of 8% per annum and all costs. . . ."

¶51. **AFFIRMED.**

SMITH, C.J., WALLER AND COBB P.JJ., DIAZ AND CARLSON, JJ., CONCUR. GRAVES, J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. DICKINSON, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED IN PART BY GRAVES, J. EASLEY, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

DICKINSON, JUSTICE, SPECIALLY CONCURRING:

¶52. In my view, Mississippi should abandon the five other states which continue to fully recognize the antiquated common law tort of alienation of affections, and join the forty-two states who refuse to do so. As well said by the Iowa Supreme Court a quarter of a century ago, "[t]here is inherent and fatal contradiction

in the term 'alienation of affections.' The alienation belies the affection." ***Funderman v. Mickelson,*** 304 N.W.2d 790, 791 (Iowa 1981). Nevertheless, I have been unsuccessful in persuading the benevolent majority which holds that the ancient and infirm cause of action shall continue to breathe in Mississippi. That said, I shall respect the majority's decision, and apply the law to alienation of affections cases which find their way here, including the case before us today. First, however, I shall state my case for abolition of the cause of action.

Evolution of the alienation of affections cause of action

¶53. The tort called alienation of affections originated in the English common law, when wives were considered their husbands' property. A third party who actively interfered with a marriage by persuading a wife to leave her husband was considered to have deprived the husband of his property. A brief overview of the development of common law alienation actions is in order to explain and provide an historical backdrop for the discussion to come.

¶54. In order to maintain pure bloodlines and discourage adultery, Teutonic tribes required a wife's lover to compensate the husband for his wife's infidelity, allowing the husband to buy a new wife and ensure the legitimacy of his offspring. ***Hoye v. Hoye,*** 824 S.W.2d 422, 423-24 (1992) (citing Lippman, *The Breakdown of Consortium,* 30 Colum. L. Rev. 651, 655

(1930)). The Anglo-Saxons later allowed actions for marital interference on the premise that wives were valuable servants to their husbands. ***Helsel v. Noellsch***, 107 S.W.3d 231 (Mo. 2003). The action was analogous to a master's claim "against one who enticed away his servant, in whose services the master held a quasi-property interest." ***O'Neil v. Schuckardt***, 733 P.2d 693, 696 (Idaho 1986). Thus, in keeping with this belief, a husband could "vindicate" his loss in the marital relationship through an action for alienation of affections, but a wife was not afforded the same right. ***Helsel***, 107 S.W.3d at 232.

¶55. Two centuries ago, in ***Hutcheson v. Peck***, 5 Johns. 196 (N.Y. 1809), the Supreme Court of Judicature of New York applied the common law tort to an action by a husband who sued his wife's father for attempting to alienate his wife's affection. Although at first agreeable to his daughter's marriage, the father-in-law began to question the Plaintiff's ability to provide for his daughter, and changed his mind. He threatened his daughter's husband, going so far as to "strike" him, and then took his daughter into his home and threatened that, if she returned to her husband, he would not support them. In analyzing the claim, the court stated that "[i]f it was the duty of the wife to return to her husband, the defendant did an unlawful act by persuading her to violate that duty. If the wife was unjustifiable in abandoning the plaintiff, the defendant is responsible for having *enticed* and *persuaded* her to abandon him." ***Id.*** at 205 (emphasis added.). The court went on to state

that, had the defendant "not been instrumental in procuring his daughter to live apart from her husband, and had he gone no further than to receive and support her," the plaintiff would have no recovery. ***Id.*** at 206. The court then stated, "[v]ery different, however, will be the conclusion, when the parent unlawfully produces the separation by sowing the seeds of discord and hatred; thereby poisoning the sources of domestic harmony and enjoyment." ***Id.***

¶56. In ***Wensmore v. Greenban,*** (Wiles 581) (Wiles' English King's Bench and Common Pleas Reports), the ancient English court declared, "[t]o be sure, it must be an unlawful *procuring* . . . and by means of [insinuations] the defendant [must have] *persuaded* the plaintiff's wife to do an unlawful act. . . ." (Emphasis added).

¶57. When Mississippi became one of the United States, it recognized and adopted most of the English common law. Thus, the civil cause of action for alienation of affections traveled with our ancestors from England to Mississippi. Over the past two hundred years, however, the cause of action has fallen into disfavor for several reasons. In the late nineteenth and early twentieth centuries, the Married Women's Property Acts were passed, giving women the same rights to own property as men. ***Hoye,*** 824 S.W.2d at 424 (citing Comment, *Alienation of Affections: Flourishing Anachronism,* 13 Wake Forest L. Rev. 585, 588 (1977)). This shift in the perception of a wife's role in the marriage forced the courts to consider the continued viability of alienations actions. ***Hoye,*** 824 S.W.2d

at 424. But instead of allowing the tort – along with its wife-as-chattel premise – to fade away, some courts began to justify alienation of affection actions as a means to preserve marriages and discourage interference by third-parties. ***Id.*** *See also* ***O'Neil,*** 733 P.2d at 696. While the rationale for the action changed, the tort's elements (in most states) remained unaltered[26] despite the new focus on marital harmony. ***Hoye,*** 824 S.W.2d at 425.

¶58. For example, consent was historically prohibited as a defense to alienation actions "based on the legal inferiority of the wife who was deemed incapable of consenting to the injury of her superior, her husband." ***Id.*** (citing H. Clark, *The Law of Domestic Relations in the United States,* § 4.2, p. 267 (1987)). And even though the cause of action has supposedly moved beyond those outdated roots, consent remains a prohibited defense today, ***id.,*** as today's case demonstrates. As one commentator noted, "[t]he idea that one spouse can recover for an act the other spouse has willingly consented to is perhaps better suited to an era that regarded one spouse as the property of another." Prosser and Keeton, *The Law of Torts,* § 124 at 917 (5th ed. 1984).

¶59. The Kentucky Supreme Court, quoting Justice Holmes, described the unfortunate rise of the legal

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[26] As will be discussed below, the tort's elements changed in Mississippi by this Court's loose interpretation of previous cases.

fiction buttressing the common law tort of alienation of affections:

> [A] common phenomenon . . . familiar to the students of history, is this. The customs, beliefs or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity, disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things and then the rule adapts itself to the new reasons which have been found for it, and enters a new career. The old form receives a new content and in time even the form modifies itself to fit the meaning which it has received.

Hoye, 824 S.W.2d at 425 (quoting Lippman, *supra*, at 672). As the Missouri Supreme Court astutely noted, "When the reason for a rule of law disappears, so too should the rule." ***Helsel***, 107 S.W.3d at 233. In Mississippi, though, the legal fiction that the common law tort of alienation of affections preserves a spouse's right to the mind and body of a partner continues to this day, only now it is masked as the means to stabilize the marital union.

Right to abolish common law actions

¶60. Because I favor strict observance of the constitutional separation of powers, reserving unto the Legislature the prerogative to legislate, and claiming for this Court the power and duty to attend to all things judicial, I feel somewhat obligated to justify my preference that this Court, rather than the Legislature, abolish the tort.

¶61. It appears that this Court first recognized the tort of alienation of affections in ***Brister v. Dunaway***, 149 Miss. 5, 115 So. 36 (1927). Notably, the Mississippi Legislature has never codified any of the so-called "heart balm torts," including alienation of affections, and the actions remain exclusively creatures of the common law.

¶62. In ***Saunders v. Alford***, 607 So. 2d 1214, 1219 (Miss. 1992), this Court, recognizing the obsolete nature of another of the common law "heart balm" torts, abolished criminal conversation. In explaining the constitutional power of the Court to abolish the cause of action, this Court stated that "the creation of common law is not a one-way street. . . . What the court gives it can take away. This Court faces no constitutional impediment to ceasing to recognize criminal conversation as a viable tort." ***Id.*** *See also* ***Funderman***, 304 N.W.2d at 793 ("Of course it is our duty to monitor and interpret the common law, and to abandon antiquated doctrines and concepts. The genius of the common law is its flexibility and capacity for growth and adaption." (Citations omitted)); ***Russo v. Sutton***, 422 S.E.2d 750, 753 (S.C. 1992) ("The common law changes when

necessary to serve the needs of the people."). Thus, because the common law is a creature of the courts, English and American, this Court and other courts are free to change it at will, recognizing that the legislative bodies of the various states are also free to enact into statutory law any provision of the common law they think appropriate.

¶63. A woman is not property, and her decision to engage in and consent to extra-marital affairs – although abhorrent to the majority (and to me) – should not be relegated to the musings of an inferior spouse, incapable of making such decisions.

Spousal affection is incapable of theft

¶64. The alienation of affections cause of action has never sufficiently separated from its property-based origins, and the tort is continued because "spousal affection" is characterized as "property" capable of theft. ***Funderman***, 304 N.W.2d at 794. However, that premise is simply illogical. "To posit that one person possesses rights to the feelings of another is an anachronism." ***Hoye***, 824 S.W.2d at 426. Even though courts today do not call the alienated affection "property" or "a possession," that is how it is treated, just as it was when courts created the cause of action to compensate husbands for the loss of their wives' "services." In the end, the successful plaintiff engages in what is essentially a "sale" of his or her spouse's affections. ***Wyman v. Wallace***, 615 P.2d 452, 455 (Wash. 1980).

¶65. Additionally, "theft" implies the taking of property from an unwilling owner by an outsider. However, the fact is that actions for alienation of affections arise from the willing participation of one spouse. While the tort purportedly exists to discourage third-parties from disturbing the martial relation, in reality the marriage is unlikely to weaken without one spouse actively consenting to the "wrongful interference." ***O'Neil***, 733 P.2d at 698. "Human experience is that the affections of persons who are devoted and faithful are not susceptible to larceny no matter how cunning or stealthful." ***Funderman***, 304 N.W.2d at 791. *See also* ***Russo***, 422 S.E.2d at 752; ***Wyman***, 615 P.2d at 455.

¶66. Importantly, I do not advocate for the abolition of this tort because I feel defendants in such suits deserve protection, or because I view promiscuity as harmless. I merely find the foundation for such suits – that someone should recover for an injury to "property" which they cannot own-completely erroneous. *See* ***Funderman***, 304 N.W.2d at 794.

No evidence the tort deters wrongful interference with or preserves marriage

¶67. As the Washington Supreme Court noted when abolishing the tort of alienation of affections, "[t]he underlying assumption of preserving marital harmony is erroneous." ***Wyman***, 615 P.2d at 455. The tort is inherently unplanned, especially where sexual activity is involved, so the idea that the parties would

contemplate the possibility of a lawsuit and be deterred is unrealistic. ***O'Neil***, 733 P.2d at 698 The truth remains that a spouse inclined to engage in an extramarital affair will do so, and even if "a would-be paramour would be thereby dissuaded [by the threat of suit], a substitute is likely to be readily found." ***Funderman***, 304 N.W.2d at 792.

¶68. The theory that alienation actions must be retained as a means of preserving marriages and protecting families must fail for lack of support. While an admirable sentiment, these suits inevitably do more to hurt families than to help them. In my view, when a marriage has crashed and burned, the law should not provide an imprimatur to fan the coals of anger and resentment, extending further into the future the time when healing can begin. This is particularly true where children are involved. Enough difficulty exists already in the development of a civil relationship among divorced parents and the children of the marriage.

Cause of action is primarily punitive and brought to gain revenge

¶69. Despite the fact that an action for alienation of affections is a civil suit and theoretically compensatory, the true nature of the claim is punitive. "The third party is seen as a malicious seducer wreaking havoc upon the harmonious marital couple. These common law actions thus reason that the third-party

must be punished for his [or her] misdeeds by payment to the aggrieved spouse." ***Hoye***, 824 S.W.2d at 425.

¶70. Undeniably, the primary motives in bringing an action for alienation of affections are to gain revenge on the unfaithful spouse and the defendant and to force outrageous settlements. ***O'Neil***, 733 P.2d at 698. Alienation of affection claims have become prime tools for extortion or blackmail. ***Russo***, 422 S.E.2d at 753; ***Wyman***, 615 P.2d at 455. Such vexatious lawsuits can make contentious divorce proceedings even more bilious. ***O'Neil***, 733 P.2d at 698. The action can also rearrange the marital assets, making it difficult for a court to properly assess the needs and abilities of the individual spouses. ***Id.*** at 697. These suits are never used to achieve reconciliation or preserve the marriage; rather, they are fueled by vindictiveness and a desire to destroy reputations and relationships. ***Helsel***, 107 S.W.3d at 233.

Injuries to parties' reputations and dignity

¶71. No party involved in an action for alienation of affections emerges unscathed. While the harm to the defendant and unfaithful spouse is clear, "the action [also] diminishes the plaintiff's dignity and injuries his [or her] own reputation through the process of seeking money damages." ***O'Neil***, 733 P.2d at 697. The intimate details of the marriage, and its breakdown, are revealed for all to see as the parties attempt to assassinate the character of their

adversaries. ***Helsel***, 107 S.W.3d at 233; ***Russo***, 422 S.E.2d at 753.

¶72. Often lost in this bitter fight is the effect the suit can have on children of the marriage. Even beyond the mere exposure to the airing of their parents' dirty laundry, children can be required to testify for one parent or another in open court. ***O'Neil***, 733 P.2d at 698. *See also* ***Funderman***, 304 N.W.2d at 791 (detailing such testimony). Clearly, any injuries that might have been caused by the wrongful conduct are exacerbated by alienation of affections actions.

Difficulty of juries to properly evaluate alienation actions

¶73. Alienation of affections cases present a particularly difficult challenge for juries. As the Iowa Supreme Court observed,

> [o]ur system of establishing facts, however, has a strong, sometimes it seems an irresistible, tendency to break down in alienation cases. This is because of the incendiary effect of the usual evidence in such cases. Under the established theory of recovery, the jury should first undertake to decide which came first, the marriage breakdown or the misconduct. But juries necessarily face the first determination after learning of conduct of which they strongly disapprove and which society condemns.

Funderman, 304 N.W.2d at 791.

¶74. The element of "inducement" often proves perplexing, as the factfinder must determine whether the defendant or the alienated spouse was primarily responsible for the other spouse straying. The Idaho Supreme Court cited a case to illustrate the dilemma where the plaintiff and spouse were separated, the spouse willingly engaged in an affair, and yet the jury still found for the plaintiff. ***O'Neil***, 733 P.2d at 698 (citing ***Sebastian v. Klutz***, 170 S.E.2d 104 (N.C. Ct. App. 1969)). The jury in this case fell into the same trap. The majority accurately points out that there was no evidence that Fitch "induced" Valentine's estranged wife to engage in an illicit affair with him. Nevertheless, the jury awarded Valentine $754,500, plus interest, for his alleged loss.

¶75. The awarding of damages presents another distinct problem in these actions, as no clear standards for compensating the plaintiff exist. ***Wyman***, 615 P.2d at 455. This opens the door for quasi-punitive damage awards, disguised as actual damages, which are usually tainted by passion and prejudice. ***O'Neil***, 733 P.2d at 698. Of course, I can hardly blame jurors for struggling with this cause of action. The theory of recovery, itself, is flawed. ***Funderman***, 304 N.W.2d at 791.

Abolition will have no effect on right to recover for loss of consortium

¶76. Abolition of the common law tort of alienation of affections will in no way restrict the right to recover for loss of consortium. "The right to recover for loss of consortium is a factor in assessing damages when the underlying liability has been established in a personal injury suit. Renunciation of the right to recover for alienation proceeds from the belief there is no basis for the underlying liability." ***Id.*** at 794. Given the specific attributes of an alienation action and the right to recover for loss of consortium, it is not inconsistent to abolish the former and continue to recognize the latter. ***Id.***

Comparison with actions for tortious interference with a contractual relationship is misplaced

¶77. A claim of tortious interference with a contractual relationship is not comparable to a claim of alienation of affections. In contract suits, the aggrieved party can sue both the interferer and the other party to the contract. However, in alienation actions, the "other party" to the "contract" is the spouse (whose affection was allegedly alienated from the plaintiff) who is not subject to suit, as in true contract cases. ***Hoye,*** 824 S.W.2d at 426. As the Kentucky Supreme Court pointed out, "[t]his logical asymmetry has prompted the majority of jurisdictions to eliminate these marital torts." ***Id.***

A majority of states have abolished the common-law action

¶78. Despite the majority's assertions to the contrary, there is simply no evidence that the alienation of affections cause of action protects marriages. ***O'Neil,*** 733 P.2d at 698. "In fact, once suit has been brought, it notifies the public that the marriage is unstable, embarrasses the spouses and their children, and adds more tension to the family relationship." ***Id.*** The majority of states have discarded this fictional rationale for preserving the common law tort of alienation of affections, and we should follow suit.

¶79. The following twenty-five states and the District of Columbia have legislatively abolished the common law tort of alienation of affections: *Alabama,* Ala. Code § 6-5-331 (1975); *Arizona,* Ariz. Rev. Stat. § 25-341 (1956); *Arkansas,* Ark. Code Ann. § 16-118-106 (1989); *California,* Cal. Civ. Code § 43.5 (1982); *Colorado,* Colo. Rev. Stat. § 13-20-202 (1973); *Connecticut,* Conn. Gen. Stat. Ann. § 52-572b (1984); *District of Columbia,* D.C. Code Ann. § 16-923 (1981); *Georgia,* Ga. Code Ann. § 51-1-17 (1979); *Indiana,* Ind. Code Ann. § 34-12-2-1 (1998); *Kansas,* Kan. Stat. Ann. § 23-208 (1982); *Maine,* Me. Rev. Stat. Ann. tit. 14, § 301 (1995); *Maryland,* Md. Code Ann., Fam. Law § 3-103 (1984); *Massachusetts,* Mass. Gen. Laws Ann. ch. 207, § 47B (1985); *Michigan,* Mich. Comp. Laws Ann. § 600.2901 (1961); *Minnesota,* Minn. Stat. Ann. § 553.01 (1978); *Montana,* Mont. Code Ann. § 27-1-601 (1983); *Nebraska,* Neb. Rev. Stat. § 25-21,188 (1986); *Nevada,* Nev. Rev. Stat. 41.380 (1979);

North Dakota, N.D. Cent. Code § 14-02-06 (1983); *Oregon,* Or. Rev. Stat. § 31.980 (2004); *Rhode Island,* R.I. Gen. Laws § 9-1-42 (1997); *Tennessee,* Tenn. Code Ann. § 36-3-701 (1989); *Texas,* Tex. Fam. Code Ann. § 1.107 (1997); *Virginia,* Va. Code Ann. § 8.01-220 (1977); *West Virginia,* W. Va. Code § 56-3-2a (1969); and *Wisconsin,* Wis. Stat. Ann. § 768.01 (1979).

¶80. The following six states have judicially abolished the common law tort: *Idaho,* in *O'Neil,* 733 P.2d at 698; *Iowa,* in ***Fundermann,*** 304 N.W.2d at 791; *Kentucky,* in ***Hoye,*** 824 S.W.2d at 423; *Missouri,* in ***Helsel,*** 107 S.W.3d at 233; *South Carolina,* in ***Russo,*** 422 S.E.2d at 753; and *Washington,* in ***Wyman,*** 615 P.2d at 455.

¶81. Thus, thirty-one states have completely abolished the common law tort of alienation of affections. But it doesn't stop there. The following eight states have legislatively abolished all alienation of affections suits for money damages: *Delaware,* Del. Code Ann. tit. 10, § 3924 (1974); *Florida,* Fla. Stat. Ann. § 771.01 (1964); *New Hampshire,* N.H. Rev. Stat. Ann. § 460:2 (1981); *New Jersey,* N.J. Stat. Ann. § 2A:23-1 (1935); *New York,* N.Y. Civ. Rights Law § 80-a (1965); *Ohio,* Ohio Rev. Code Ann. § 2305.29 (1990); *Vermont,* Vt. Stat. Ann. tit. 15, § 1001 (1973); and *Wyoming,* Wyo. Stat. Ann. § 1-23-101 (1977).

¶82. *Oklahoma* has abolished the tort when a spouse of sound mind/legal age is involved. Okla. Stat. tit. 76, § 8.1 (1976) *Pennsylvania* has abolished the tort except in those cases where the defendant is

the parent or sibling of the plaintiff's spouse Pa. Stat. Ann. tit. 23, § 1901 (1990). *Illinois* only permits actual damages to be recovered in alienation of affection actions 740 Ill. Comp. Stat. Ann. 5/2 (1990). *Alaska* and *Louisiana* have never even recognized the tort. *See* ***Moulin v. Monteleone,*** 115 So. 447, 451 (La. 1927), *overruled in part on other grounds by* ***9 to 5 Fashions v. Spurney,*** 538 So. 2d 228, 234 (La. 1989).

¶83. Only six states continue to fully recognize the common law tort of alienation of affections: Hawaii, Mississippi, New Mexico, North Carolina, South Dakota, and Utah. It is, in my view, time that Mississippi's name be removed from this ever-dwindling list and recognize what so many other jurisdictions have long since realized: alienation of affections suits have outlived any relevance or usefulness they may have once possessed. The Court recognized this truth with respect to the tort of criminal conversation, and we abolished that cause of action accordingly. ***Saunders,*** 607 So. 2d at 1219. The same course of action should be followed here, and this Court should likewise abolish the common law cause of action for alienation of affections.

II.

¶84. Having failed to gain agreement from a majority of Justices on elimination of the cause of action, I must now analyze the case before us. Despite my view that the cause of action for alienation of affections should be eliminated in Mississippi, a majority

of this Court wishes it to remain viable. Since my oath of office requires me to follow the law as it exists, not as I think it should be, I cannot deprive the plaintiff of my vote simply because my personal view is that the law should be changed. A vote to dissent would be justified in this case only if I conclude that the existing law has been improperly applied. In my view, Justice Randolph's analysis of the law and his application of the law to this case is exactly correct. Indeed, I am grateful that Justice Randolph has taken this opportunity to clarify an area of the law which, because of previous cases handed down by this Court, has become muddled. The majority clearly sets forth the requirement that alienation of affections claims may be maintained only where the defendant can be shown to have committed a wrongful act which served to induce or entice a spouse to abandon the marriage relationship. For these reasons, with respect to the majority's disposition of this case under our current law, I concur.

¶85. I commend the majority for clarification of this issue.

GRAVES, J., JOINS THIS OPINION IN PART.

EASLEY, JUSTICE, DISSENTING:

¶86. On appeal, Jerry Fitch, Jr. (Fitch) raised numerous assignments of error: (1) whether the tort of alienation of affections should be abolished; (2) whether the trial court erred in allowing Johnny Valentine (Valentine) to use unsworn pleadings to

impeachment Fitch; (3) whether the trial court erred in granting Valentine's jury instructions, P-5 and P-8; (4) whether the trial court erred in denying Fitch's jury instruction, D-8; (5) whether the compensatory award in this case was contrary to the weight of the evidence; (6) whether the compensatory award in the case was contrary to the weight of credible evidence and the product of bias, passion, and prejudice; (7) whether the punitive damage award in this case violates due process; and (8) whether the trial court erred in denying a substantial remittur.

I. Alienation of Affections.

¶87. While the Valentines' marriage was unquestionably not a "shining example" of marriage, and divorce is unfortunately increasingly prevalent in our society, I agree that the Court should decline the invitation to abolish the tort of alienation of affections. Alienation of affections is the only avenue available to provide redress for a spouse who has suffered loss and injury to his or her marital relationship against the third party who induced the husband or wife to abandon the marriage and/or affections due to his or her active, direct, and intentional interference with the marriage.

¶88. In ***Camp v. Roberts***, 462 So. 2d 726, 727 (Miss. 1985), this Court held:

> [W]here a husband [wife] is wrongfully deprived of his rights to the "services and companionship and consortium of his [her] wife

> [husband]," he [she] has a cause of action "against one who has interfered with his [her] domestic relations."

Camp, 462 So. 2d at 727 (citing ***Walter v. Wilson***, 228 So. 2d 597, 598 (Miss. 1969), *overruled in part on other grounds,* ***Saunders v. Alford***, 607 So. 2d 1214, 1219 (Miss. 1992)). The tort of alienation of affections is equally applicable to women as men as to avoid any archaic notion that a wife is the property of her husband. *See* ***Kirk v. Koch***, 607 So. 2d 1220, 1224 (Miss. 1992).

¶89. Chief Justice Smith, then Justice Smith, authored an excellent special concurring opinion in ***Bland***, which clearly explained the justification and need to continue to recognize alienation of affections as a viable tort, stating:

> [W]here the proof is so great in support of an action for alienation of affections, we must ask the following questions. Should an individual be allowed to intrude upon a marriage to such an extent as to cause it to come to an end? Does a spouse have a valuable interest in a marriage that is worthy of protection from the intruding third party? In my view, the answer to both questions is in the affirmative. ***The traditional family is under such attack both locally and nationally these days that this Court should not retreat now from the sound view of the tort of alienation of affections espoused by this Court in Saunders as entitling a spouse to "protection of the love, society,***

> ***companionship, and comfort that form the foundation of a marriage." Saunders v. Alford,*** 607 So. 2d 1214, 1215 (Miss. 1992) (quoting ***Norton v. Macfarlane,*** 818 P.2d 8, 12 (Utah 1991)); *see also* ***Horner v. Byrnett,*** 511 S.E.2d 342 (N.C. Ct. App. 1999). I do not believe that under the compelling facts of this particular case this Court should hold that the doctrine of alienation of affections has outlived its usefulness as a deterrent protecting the martial [sic] relationship of a husband and wife in cases where the facts clearly warrant. 607 So. 2d at 1219.

Bland, 735 So. 2d at 421-422 (Smith, J., specially concurring) (emphasis added).

II. Judgment Not Withstanding the Verdict (JNOV).

¶90. The required elements of an alienation of affections lawsuit include: (1) wrongful conduct of the defendant, (2) loss of affection or consortium, and (3) a causal connection between the conduct and the loss. ***Bland v. Hill,*** 735 So. 2d 414, 417 (Miss. 1999) (emphasis added). In ***Bland,*** this Court held that "the purpose of a cause of action for alienation of affections is the 'protection of the love, society, companionship, and comfort that form the foundation of a marriage . . . '" ***Bland,*** 735 So. 2d at 417 (quoting ***Saunders,*** 607 So. 2d at 1215).

¶91. The "wrongful conduct" required to maintain an action for the tort of alienation of affections is the

direct and intentional interference with the marriage relationship by the defendant and an ***inducement to abandon the spouse by some active interference by the defendant***. *See* ***Children's Medical Group v. Phillips,*** 940 So. 2d 931, 934 (Miss. 2006); ***Stanton v. Cox,*** 162 Miss. 438, 450, 139 So. 458, 460 (1932). In ***Stanton,*** 139 So. at 460, this Court held:

> "In order to sustain an action for the alienation of the husband's [wife's] affections it must appear, in addition to the fact of alienation or the fact of the husband's [wife's] infatuation for the defendant, that ***there had been a direct interference on the defendant's part, sufficient to satisfy the jury that the alienation was caused by the defendant,*** and the burden of proof is on the plaintiff to show such interference." 15 Am. & Eng. Ency. of Law, p. 865. Again, on page 866, it is said: "***But to maintain this action it must be established that the husband [wife] was induced to abandon the wife [husband] by some active interference on the part of the defendant.***" In 3 Elliott on Evidence, section 1643, it is said: "To entitle the plaintiff to recover in an action for alienating affections, the burden of proof is upon the plaintiff, and the plaintiff must show that there was a direct interference upon the part of the defendant that not only was there infatuation of the husband or wife for the defendant, but that the defendant by wrongful act was the cause of it."

(Emphasis added). *See also* ***Kirk***, 607 So. 2d at 1223; ***Martin v. Ill. Cent. R.R. Co.***, 246 Miss. 102, 110-11, 149 So. 2d 344, 348 (1963). In ***Kirk***, this Court stated that the defendant must "directly and intentionally [interfere] with" plaintiff's marriage, thereby ***inducing*** the alienation of affections of the plaintiff's spouse. ***Kirk***, 607 So. 2d at 1223 (emphasis added).

¶92. The majority correctly recognizes that inducement is a specifically required element to establish alienation of affections, rather than alienation of affections being established solely from the fact that an affair or sexual relationship occurred. However, the majority's reasoning remains fatally flawed. The majority focuses its reasoning to establish inducement from the undisputed fact that Fitch is a wealthy man, and Sandra could not resist his money. The majority misses the point that there must be established some "wrongful conduct" on the part of Fitch that amounted to the direct and intentional interference with the marriage relationship and resulted in the inducement of Sandra to abandon Valentine by some active interference on the part of Fitch. Sandra testified that Fitch did not ask her to leave Valentine, and she was the initiator of the eventual relationship.

¶93. Here, the majority bases the inducement on *Sandra's* alleged inability to resist Fitch's money and the fact that Sandra had a lot of money in cash when she worked for Fitch. However, both Sandra and Fitch testified that Fitch did not give Sandra any money above and beyond what she earned in her salary from working for Fitch Oil Company and in

commissions from the sale of real estate for Fitch Realty. According to the record, Sandra began working at Fitch Oil Company sometime in 1997. Sandra testified that her relationship with Fitch did not start until sometime in the spring of 1998. She testified that she believed that she had worked there approximately sixteen months before ***she initiated*** flirtation and the affair with Fitch. Fleming, who worked as the bookkeeper for Fitch Oil Company testified as to how Sandra was paid her salary. Fleming verified that Fitch paid all his employees in cash.

¶94. Fitch testified regarding the money he gave to Sandra before they were married. He stated that Sandra worked out of Fitch Oil Company, but she also worked in Fitch Realty as a realtor. Fitch stated that Sandra, like all of his employees, was paid in cash for her weekly salary plus commissions on what she sold. According to Fitch's testimony, he never gave Sandra any extravagant gifts nor took any trips with her. He further denied that he ever gave Sandra $8,000 in cash to purchase a Jeep Cherokee. Fitch testified that he did not recall giving Sandra any money over and above her salary and commissions.

¶95. Further, Sandra and Fitch both denied that Fitch had ever made any threats against Sandra that he would take her child away from her. Sandra also denied any physical threats from Fitch. Sandra testified that Fitch never asked her to leave Valentine. Sandra subsequently married Fitch after she divorced Valentine, and she was still married to Fitch

at the time of the trial. Further, Sandra met Valentine under similar circumstances.

¶96. Prior to trial, Valentine filed a motion in limine to prevent Fitch from introducing any evidence that Valentine and his former wife, Sandra, engaged in and participated in a lengthy adulterous relationship prior to their marriage while Sandra was still married to a prior husband, Tracey Hughey. After Sandra's divorce from her husband, Hughey, she married Valentine. The trial court granted the motion in limine to exclude the testimony regarding Valentine's adulterous affair with Sandra.

¶97. As will be discussed in greater detail below, Sandra testified that she was the initiator of the relationship with Fitch. This fact is completely ignored in its reasoning by the majority which acknowledges that the spouse must have been induced to abandon the marriage. It is hard to imagine how Sandra was the one induced when she testified that she pursued Fitch, who was married at the time, and she was the initiator of their eventual relationship.

¶98. Fitch made a post-trial motion for JNOV. In Fitch's reply memorandum, Fitch contended that "[the] plaintiff was unable to show that [the] defendant's direct interference with the marital relationship caused the alienation of the plaintiff's affections." Fitch stated that "the plaintiff's theory of the case" was that "Sandra [Valentine Fitch] was attracted to [the] defendant's money." Fitch further noted that the evidence of adultery satisfied the first

prong of the inquiry, however, "the plaintiff was unable to prove loss of affection as a result of that conduct." The trial court subsequently entered its order denying Fitch's motion for JNOV.

¶99. Pursuant to M.R.C.P. 50(b), "a party may file a motion to have the verdict and any judgment entered thereon set aside," no "later than ten days after entry of judgment in accordance with a verdict." M.R.C.P. 50(b). A motion for JNOV challenges the legal sufficiency of the evidence. ***McFarland v. Entergy Miss., Inc.***, 919 So. 2d 894, 904 (Miss. 2005); ***McClain v. State***, 625 So. 2d 774, 778 (Miss. 1993). "[T]his Court properly reviews the ruling on the last occasion the challenge was made in the trial court." ***McClain***, 625 So. 2d at 778. Here, this occurred when the trial court denied Fitch's motion for JNOV. In ***White v. Stewman***, 932 So. 2d 27, 32-33 (Miss. 2006), this Court recently provided an excellent analysis of what occurs when a motion for JNOV is made pursuant to M.R.C.P. 50(b), stating:

> Rule 50(b) allows the court to reserve the decision on this critical question of law until after the case has been submitted to the jury and the jury has reached a verdict or has informed the judge of its inability to agree on a verdict. Wright & Miller, Federal Practice and Procedure: Civil 2d § 2521, p. 241. "If the court decides that the initial motion for judgment as a matter of law should have been granted, it may set aside the verdict of the jury and enter a judgment as a matter of law. . . . Thus the rule gives the

> trial court a last chance to order the judgment that the law requires." ***Id.***, pp. 241-42.

When a proper post-verdict motion for a JNOV has been made, the court has three options:

> First, of course, it may deny the motion and enter judgment on the verdict. Alternatively, it may grant the motion and order judgment for the moving party. Either of these actions results in a final appealable judgment. Third, the court may think the motion well taken but the defect in the proof possibly remediable and thus order a new trial rather than judgment as a matter of law. An order granting a new trial is interlocutory in nature and generally not appealable.

Wright & Miller, Federal Practice and Procedure: Civil 2d § 2540, p. 366-67. (See also Miss. R. Civ. P. 50, cmt.).

The standard of review for the denial of a motion for JNOV is well settled:

> A motion for a JNOV tests the legal sufficiency of the evidence supporting the verdict, not the weight of the evidence. ***Tharp v. Bunge Corp.***, 641 So. 2d 20, 23 (Miss. 1994). It asks the court to hold, as a matter of law, that the verdict may not stand. ***Goodwin v. Derryberry Co.***, 553 So. 2d 40, 42 (Miss. 1989) (citing ***Stubblefield v. Jesco, Inc.***, 464 So. 2d 47, 54 (Miss. 1984)). When a motion for JNOV is made, the trial court must consider all of the evidence – not just evidence

> which supports the non-movant's case – in the light most favorable to the party opposed to the motion. If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable jurors could not have arrived at a contrary verdict, granting the motion is required. ***Janssen Pharmaceutica, Inc. v. Bailey***, 878 So. 2d 31, 54 (Miss. 2004).

McFarland, 919 So. 2d at 899-900 (quoting ***White v. Yellow Freight System, Inc.***, 905 So. 2d 506, 510 (Miss. 2004)).

¶100. Sandra testified that she met Valentine in 1989 when she was married to someone else. They were married years later in 1993. Sandra went to work for Fitch Oil Company sometime in 1997. According to Sandra's testimony, she was the initiator of the relationship with Fitch. She testified that she was the one who pursued Fitch and flirted with him. She testified that she was attracted to Fitch and fell in love with him. Eventually, Sandra and Fitch began a relationship sometime in 1998 that eventually became sexual.

¶101. Sandra testified that her marriage to Valentine was already over before the relationship began. According to Sandra's testimony, her marriage to Valentine was over in her mind in 1996, before she ever met Fitch in 1997. She testified that Valentine spent his money and time gambling and hanging out with his buddies rather than spending any time with her. She stated that Valentine routinely came home

drunk, and they had no communication with each other. Sandra testified that after she stopped hanging out with Valentine at his buddy's house sometime in 1995 or 1996, she rarely saw him. Sandra testified that she would go to Valentine's buddy's house or the casinos and try to get him to come home. Sandra testified that at times, Valentine would not come home for days, with the longest period being three days.

¶102. She stated she "would scream, cry, holler," but "nothing helped." In January of 1996, she went to the casino and told him that if he did not leave the casino then the marriage was over. They talked outside and ended up in a fight. She stated that Valentine walked back inside the casino instead of coming home with her. Sandra testified that was the moment that the marriage was over in her mind. According to Sandra, she was married to "someone that didn't show . . . affection."

¶103. Sandra testified that she had come to resent having to have sex with Valentine because he had "turned . . . [her] against him." Sandra stated that Valentine "never spoke to her." She testified that "[h]e never had anything to say, and then he would expect me to just want to touch . . . he just wanted to have sex with me." When Valentine wanted to have sex, she considered the act of sex "just something to get him . . . to get the job done and get through." Sandra alleged that Valentine had failed to provide financial support for their son, J.V., since the divorce and that Fitch was having to support him.

¶104. Fitch testified that at the time the relationship began he knew Sandra was married, but Sandra told him that she "did not have a marriage any more." However, by the time that the relationship became sexual, Fitch testified that he did concern himself about Sandra's marriage. Fleming testified that Sandra had confided in her regarding the problems in her marriage to Valentine.

¶105. Sandra testified that Fitch did nothing to threaten her into the relationship or to remain in a relationship. Further, Fitch never threatened to take K.V. away from her if she did not continue working for him or the relationship. When Valentine insisted that Sandra quit working for Fitch, she refused and testified that she had no intention of ever quitting. Sandra testified that the cash she had came from her salary and commission. Fitch did not give her money in exchange for sexual relations or to entice her into the relationship or to remain in the relationship. Fitch testified that he never gave Sandra any extravagant gifts and did not recall giving her any money except for her salary and commissions paid in cash like all his employees. Fleming testified that Fitch paid all his employees in cash.

¶106. Valentine confronted Sandra regarding whether she was having an affair. Sandra denied the accusation. Later, Valentine confronted Fitch and Sandra, inquiring if they were having an affair. Both denied the accusation. Valentine was aware that K.V., born in 1999, was not his child. The paternity test

showed that Valentine had no chance of being the father.

¶107. Valentine presented no evidence that Sandra was not the initiator of the relationship with Fitch. Valentine made unsupported accusations that Fitch was giving Sandra money to have a relationship with him and that he had threatened to use his money to take K.V. away from Sandra if she ended the relationship. Sandra and Fitch both denied the allegations. Valentine alleged that Sandra sought to "trade up" by becoming involved with Fitch, and he testified as to the change in Sandra's lifestyle since she married Fitch.[27] Years after Sandra and Valentine were divorced, Sandra and Fitch were married and were married at the time of trial.

¶108. This Court has established the required elements of an action for alienation of affections: (1) wrongful conduct of the defendant, (2) loss of affection or consortium, and (3) a causal connection between the conduct and the loss. ***Bland***, 735 So. 2d at 417. However, in order to maintain an action for alienation of affections, "it must be established that the husband [wife, Sandra,] was induced to abandon the wife [husband, Valentine,] by some active interference on the part of the defendant [Fitch]." ***Stanton***, 139 So. at 460. In ***Kirk***, this Court again stated that the defendant must "directly and intentionally [interfere] with" plaintiff's marriage, thereby inducing the

[27] Sandra and Fitch were married at the time of trial.

alienation of affections of the plaintiff's spouse. ***Kirk***, 607 So. 2d at 1223.

¶109. Here, according the record, the Valentines' marriage had deteriorated before Sandra began a relationship with Fitch. Nothing contradicted Sandra's assertion that she was the initiator of the relationship with Fitch. She testified that she had no affection left for Valentine for Fitch to have alienated. There is a lack of evidence that Fitch directly and intentionally interfered the Valentines' marriage by inducing Sandra's affections. While Fitch's and Sandra's conduct is clearly not admirable, the evidence fails to support a claim of alienation of affections.

¶110. Further, Valentine failed to present sufficient evidence of any economic loss to support the award of damages he received. Valentine's failure to present any evidence that he suffered financially from the alleged alienation of affections results in our inability to determine that he is entitled to an award of damages. The only argument advanced by Valentine was that he lost his house and physical custody of his son, J.V.

¶111. However, the record provides that Valentine voluntarily surrendered possession of the marital home to Sandra in the property settlement agreement signed by the parties. Sandra agreed to pay Valentine $32,500 for his interest in the house within 30 days of the agreement. Valentine also was granted a divorce on the grounds of adultery as part of the terms of the property settlement agreement.

¶112. In fact, the parties' property agreement *specifically* provided that Sandra would admit that Valentine was entitled to a divorce on the ground of adultery as a condition of the property settlement. Therefore, from the language of the settlement agreement, it is apparent that Valentine exchanged the possession and use of the marital home and received $32,500 for his interest in the house in return for Sandra's admission of adultery.

¶113. According to Sandra's testimony, Valentine never sought custody of J.V. Likewise, in the child custody agreement signed by the parties, Valentine allowed Sandra to have the "paramount permanent physical custody of the minor child," J.V., subject to his visitation rights. Sandra testified that Valentine was not paying his child support for J.V. as agreed in the divorce settlement. Valentine admitted that he exchanged the house and custody of J.V. for Sandra's admission of adultery. The record provides:

> Q: Now, in the – what you ended up giving up, basically, is the house and the child, but what you got was an admission of adultery, didn't you?
>
> A: Yes, sir.
>
> Q: And that was very important to you, wasn't it?
>
> A: At the time, yes, sir.
>
> Q: Because you needed that admission of adultery to get here today, didn't you?

A: Yes, sir, I believe I did.

¶114. As shown above, Valentine testified that he exchanged possession of the house and physical custody of J.V. for the purposes of developing an alienation of affections lawsuit. However, Valentine later explained that his decision to agree to Sandra receiving physical custody of J.V. was also influenced by his desire to not separate J.V. from his sister, K.V.

¶115. Moreover, Valentine introduced no medical bills in support of any alleged damages he suffered. Valentine testified that he had gone to the hospital once for anxiety and was prescribed the medication, Paxil, by Dr. Ross Collins. He stated that he took the Paxil for only "a couple of months at the very most." However, no medical records were introduced and no medical charges were introduced by Valentine. Valentine testified that it was hard to focus on his business during the time following the divorce. However, he did not testify that he lost any business during that time. Likewise, Valentine did not testify that he lost any income as a result of the alleged alienation of affections.

¶116. Therefore, I find that the trial court erred in denying Fitch's motion for JNOV. Based on the record, the jury's verdict was incorrect and not based upon legally sufficient evidence to prove a claim of alienation of affections. I would reverse the judgment of the Circuit Court of Marshall County in the amount of $642,000 in actual damages and $112,500 in punitive damages, for a total of $754,500, in favor

of Valentine and render judgment in favor of Fitch. As my decision to reverse and render judgment regarding the issue of JNOV, this assignment of error raised by Fitch is dispositive of the other issues he raised on appeal.

APPENDIX B

[SEAL]

MANDATE
SUPREME COURT OF MISSISSIPPI

To the Marshall County Circuit Court – GREETINGS:

In proceedings held in the courtroom, Carroll Gartin Justice Building, in the city of Jackson, Mississippi, the Supreme Court of Mississippi entered a judgment as follows:

Supreme Court Case # 2005-CA-01800-SCT
Trial Court Case #M99-380

Jerry Fitch, Sr. v. Johnny Valentine

Thursday, 19th day of April, 2007
Affirmed. Appellant taxed with costs of appeal.

Thursday, 26th day of July, 2007
Motion for rehearing filed by appellant is denied. Easley and Graves, JJ., would grant. Lamar, J., not participating.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

I, Betty W. Sephton, Clerk of the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi, certify that the above judgment is a true and correct copy of the original which is authorized by

law to be filed and is actually on file in my office under my custody and control.

Witness my signature and the Court's seal on August 2, 2007, A.D.

/s/ Betty W. Sephton
CLERK

(2)

No. 07-569

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JERRY FITCH, SR.,

Petitioner,

v.

JOHNNY VALENTINE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MISSISSIPPI SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Mississippi Supreme Court's decision, upholding a long-standing state cause of action which is the only avenue against third party for a spouse who has suffered injury in his marital relationship due to the intentional actions of a third party that contributed to the abandonment of the marriage.

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INTRODUCTION

This case involves the tort of alienation of affections and whether or not punitive damages may be awarded for the malicious act of adultery Petitioner Jerry Fitch committed and was found liable for under this tort. The tort of alienation of affections and whether or not this tort should exist is solely a state issue, and adultery is not protected under the First or Fourteenth Amendment. Mississippi has chosen to continue to recognize the tort of alienation of affections and places a high importance on the institution of marriage and the family.

Punitive damages were properly awarded for the malicious acts of Petitioner Jerry Fitch and is not a deprivation of property as defined by this Court in *Campbell v. State Farm*, 538 U.S. 408 (2003).

STATEMENT OF THE CASE

Respondent, Johnny Valentine, filed a lawsuit in the Circuit Court of Marshall County, Mississippi on or about December 21, 1999, against Petitioner, Jerry Fitch alleging alienation of affection. (App. A, p. 7, ¶ 10).[1]

On or about March 30, 2005, closing arguments were heard and after deliberating, the jury unanimously awarded Johnny Valentine $642,000 in actual damages and $112,500 in punitive damages. (App. A, p. 7, ¶ 11). On April 12, 2005, Jerry Fitch filed his Motion for

1. The appendices referred to in this Brief are attached to Fitch's Petition.

Judgment Notwithstanding Jury Verdict, Motion for New Trial, and Motion for Remittitur to which Johnny Valentine responded. *Id.* Jerry Fitch then filed a reply to Johnny Valentine's response and for the first time asked the trial court to abolish the tort of alienation of affection. *Id.* As a result, Johnny Valentine filed his Motion to Strike the portion of Jerry Fitch's reply asking the trial court to abolish the tort of alienation of affection. (App. A, p. 8, ¶ 11, n.9). After hearing oral arguments, the trial court denied all of Jerry Fitch's motions. (App. A, p. 8, ¶ 11). Feeling aggrieved by the verdict and the denial of his motions, Jerry Fitch appealed to the Mississippi Supreme Court. *Id.*

The Mississippi Supreme Court continued to hold that the tort of alienation of affections in Mississippi is a valid cause of action to remedy the intentional conduct that causes a loss of consortium and that the award of punitive damages in this case did not violate the Due Process clause.[2] (App. A, p. 13, ¶ 11 and p. 34, ¶ 44). Jerry Fitch subsequently filed a motion for rehearing which was denied on April 26, 2007. (App. B, p. 73). Fitch now seeks review in this Court.[3]

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2. Jerry Fitch addressed other issues in his appeal to the Mississippi Supreme Court. These issues have not been raised with this Court and for that reason, Respondent Johnny Valentine will not address these in his Brief.

3. Respondent Johnny Valentine contends that Petitioner has failed to correctly raise anissue on appeal; one must preserve the error or they usually forfeit their opportunity to bring it before the appellate court. Petitioner Jerry Fitch failed to raise the issue regarding punitive damages and their

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REASONS FOR DENYING THE PETITION

I. THE PETITIONER FAILS TO ESTABLISH ANY CONSTITUTIONAL GROUNDS FOR THIS COURT TO GRANT HIS PETITION

Petitioner Fitch contends that the award of punitive damages for his conduct is unconstitutional under the First Amendment and the Due Process Clause of the Fourteenth Amendment. To support his argument, Petitioner mainly relies upon *Lawrence v. Texas*, 539 U.S. 558 (2003), *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and *Campbell v. State Farm*, 538 U.S. 408 (2003).[4] None of the cases cited nor has any opinion by this Court held that adultery is constitutionally protected conduct. Petitioner cites to *Lawrence* for support; however, *Lawrence* concerns consensual homosexual activity in the privacy of one's home.

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Constitutionality. During the trial, Appellant never objected to punitive damages on the basis of Constitutionality. As further evidence that Appellant has waived the punitive damages argument, he never raised the issue of punitive damages during any of his pretrial motions nor in any of his post-trial motions did he ask the trial court to remit the punitive damages amount or for a judgment not withstanding the verdict on the issue of punitives.

4. Petitioner also cites to *Griswold v. Connecticut*, 381 U.S. 479 (1965), which concerned the use of contraceptives and found that it was a "protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom". *Lawrence*, 539 U.S. at 565 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

The *Lawrence* Court continually emphasized that the sodomy law, at issue in the case, concerned one of the most private human conduct in one of most private of places. The Court also recognized that the protection of sexual conduct in one's home caused no injury to another person.

> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set boundaries absent injury to a person or abuse of an institution the law protects.

Lawrence, 539 U.S. at 567.[5]

Adhering to *Lawrence*, the Petitioner Fitch has no rights to intentionally cause injury to an innocent third party and to the institution of the marriage between Johnny Valentine and Sandra which the tort of alienation of affections protects. Petitioner Fitch's intentional actions of committing adultery with Respondent's, Johnny Valentine's, wife are not protected by the United State's Constitution. There is no fundamental right for Fitch to wreak havoc in the life of an innocent party, such as Respondent Johnny Valentine.

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5. Petitioner Fitch relies in part on *Roberts v. United States Jaycees*, 468 U.S. 609 (U.S. 1984). The facts in *Roberts* are significantly different from the facts of the present case. *Roberts* concerns whether or not an organization should be required to accept women as regular members. In so doing, the Court concluded that the *Roberts* case did not fall into the category of intimate human relationships. *Roberts*, 468 U.S. at 620.

Mississippi has a right as a state to protect its interest in marriage and in the family unit. The Mississippi Supreme Court has decided to continue to allow alienation of affection cases against third parties who cause the destruction and breakdown of the marital bond and family relationship. The Mississippi Supreme Court has stated the following:

> In retaining the tort, this Court has stated that "the purpose of a cause of action for alienation of affection is the 'protection of the love, society, companionship, and comfort that form the foundation of a marriage. . . .' "

(App. A, p. 11, ¶ 16).[6]

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6. In its opinion in this matter, the Mississippi Supreme Court quoted to a previous case on alienation of affections regarding the need for this tort.

> [s]hould an individual be allowed to intrude upon a marriage so such an extent as to cause it to come to an end? Does a spouse have a valuable interest in a marriage that is worthy of protection from the intruding third party? In my view, the answer to both questions is in the affirmative. *The traditional family is under such attack both locally and nationally these days that this Court should not retreat now from the sound view of the tort of alienation of affections espoused by this Court in Saunders as entitling a spouse to "protection of the love, society, companionship, and comfort that form the foundation of a marriage.* I do not believe that under the compelling facts of this particular case this Court should hold that the doctrine of alienation of

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In deciding not to abolish the tort of alienation of affections, the Mississippi Supreme Court held that:

> Therefore, in the interest of protecting the marriage relationship and providing a remedy for intentional conduct which causes a loss of consortium, this Court declines the invitation to abolish the common law tort of alienation of affections in Mississippi. Alienation of affections is the only available avenue to provide redress for a spouse who has suffered loss and injury to his or her marital relationship against the third party who, through persuasion, enticement, or inducement, caused or contributed to the abandonment of the marriage and/or the loss of affections by active interference.

(App. A, p. 13-14, ¶ 16).

Although *Bowers v. Hardwick*, 478 U.S. 186 (1986), was overruled by *Lawrence*, the Court in *Lawrence* still analyzed whether or not there was a long standing history in prohibiting homosexual conduct. *Lawrence*, 539 U.S. at 568. The United States District Court for the Middle District of Florida has applied this reasoning to the act of adultery, and it held that the First

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(Cont'd)

> affections has outlived its usefulness as a deterrent protecting the marital relationship of a husband and wife in cases where the facts clearly warrant.

(App. A, p. 57-58, ¶ 16) (emphasis in original) (internal citations omitted).

Amendment right of free association did not afford protection to a police officer who engaged in extramarital adulterous relationship. *Caruso v. City of Cocoa, Florida*, 260 F. Supp.2d 1191, 1207-08 (M.D. Fla. 2003). The district court cited to this Court as follows:

> Although the right to associate has been expanded to protect certain dating relationships, *See Wilson v. Taylor*, 733 F.2d 1539, 1544 (11th Cir. 1984), the Supreme Court has held that not every "kind of private sexual conduct between consenting adults is constitutionally insulated." *Bowers v. Hardwick*, 478 U.S. 186, 191, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). Rather, insofar as the Due Process Clause of the Fourteenth Amendment is concerned, only those associations that are "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" are entitled to heightened judicial protection. *Id.* at 191-192, 106 S.Ct. 2841. Applying the aforementioned formulations, the Supreme Court rejected the argument that the Due Process Clause of the Fourteenth Amendment protects the rights of homosexuals to engage in acts on consensual sodomy. *See id.* at 192-194, 106 S.Ct. 2841.

Caruso, 260 F. Supp.2d at 1207.

The District Court found that "proscriptions against adultery have ancient roots." *Id.* Contrary to Petitioner's contentions in attacking the constitutionality of his conduct, he is seeking this Court to state that adultery

is constitutionally protected and to abolish the tort of alienation of affections in all seven states that recognize this tort. Adultery is not constitutionally protected.

> In light of the historical treatment of adultery, this Court will apply the reasoning of *Bowers* to this case, and follow the Sixth Circuit's well-reasoned opinion in *Marcum v. McWhorter*, where the Court of Appeals rejected the theory that the First Amendment protects extramarital affairs on the grounds that the right "to engage in an intimate sexual relationship with the spouse of another cannot be said to be either deeply rooted in this Nation's history and tradition or implicit in the concept of ordered liberty." *Id.* at 642. "Adulterous conduct is the very antithesis of marriage and family" and, therefore, "such behavior cannot be compared to any of the fundamental matters of personal choice that lie at the core of traditional notions of individual liberty."

Id. at 1208.

The punitive damages award issued against Petitioner Fitch was for unlawful conduct–the act of adultery. At least three parties are affected by the act of adultery. In our case, the three parties are Johnny and Sandra Valentine, the married couple, and Jerry Fitch, the intruder into a marital relationship. All three parties are affected by the adulterous relationship between Sandra and Petitioner Fitch. The act of adultery is more than a private act between Petitioner Fitch and Sandra;

it is a public act due to the involvement of Johnny Valentine and the innocent minor child.

Not only is adultery not protected by the Constitution, it is also prohibited by laws of the State of Mississippi.

> If any man and woman shall unlawfully cohabit, whether in adultery or fornication, they shall be fined in any sum not more than five hundred dollars each, and imprisoned in the county jail not more than six months; and it shall not be necessary, to constitute the offense, that the parties shall dwell together publicly as husband and wife, but it may be proved by circumstances which show habitual sexual intercourse.

Miss. Code Ann. § 97-29-1.

Adultery is also grounds for divorce in many states, including Mississippi. See Miss. Code Ann. § 93-5-1. If adultery is constitutionally protected, as Petitioner Fitch claims, this would call into question whether or not a state could use adultery as grounds for a divorce, and a spouse could not divorce another spouse for adultery.

II. THE AWARD OF PUNITIVE DAMAGES FOR UNLAWFUL CONDUCT IS CONSTITUTIONAL AND COMPLIES WITH THE STANDARDS ANNOUNCED BY THIS COURT

The Mississippi Supreme Court has held that punitive damages "are assessed as a warning and example to deter not only the offender but others similarly situated from committing like offenses in the future." *Sudeen v. Castleberry*, 794 So. 2d 237, 249 (Miss. Ct. App. 2001). "[U]nder Mississippi law . . . [punitives] are to be awarded as punishment for the defendant's wrongdoings so that others may be deterred from similar offenses." *Gordon v. Nat'l States Ins. Co.*, 851 So. 2d 363, 366 (Miss. 2003) (citing *Ciba-Geigy Corp. v. Murphree*, 653 So. 2d 857, 874 (Miss.1994)).

There is no Mississippi case nor case by the U.S. Supreme Court providing that punitive damages are prohibited in an alienation of affection or loss of consortium action. See *Gorman*, 792 So.2d at 315-316. In fact, the Mississippi Supreme Court has recognized punitive damages as proper relief in alienation of affection cases since *Brister v. Dunaway*, 115 So. 36 (Miss. 1928) and has never intimated that the law has changed. In *Bland v. Hill*, 735 So. 2d 414 (Miss. 1999), the Mississippi Supreme Court considers the issue of punitive damages in an alienation of affection case.[7]

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7. The Mississippi Supreme Court cited to *Walter v. Wilson*, 228 So. 2d 597 (Miss. 1969) wherein it stated that:

> The modern trend of authority in the case of alienation of affection is that before the trial judge

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As required by Miss. Code Ann. § 11-1-65 and by the Mississippi Supreme Court in *Walter v. Wilson*, 228 So. 2d 597 (Miss. 1969), Petitioner Fitch did act with actual malice by committing adultery. The necessary elements were present for the jury to determine whether or not to grant punitive damages in this case.

The punitive damages award in this case does not violate any of the due process cases rendered by the United States Supreme Court. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 568 (1996). Nor does this award of punitive damages violate any of this Court's due process cases. See *Campbell*, 538 U.S. 408. The *Campbell* Court stated that only when an award is grossly excessive does it constitute an arbitrary deprivation of property and furthers no legitimate purpose. *Id.* at 417. This award of punitive damages not only punishes Petititoner Fitch for his wrongdoings, it also deters him and other citizens of this State from destroying a marriage by alienating the affections of a spouse. This purpose conforms with the

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(Cont'd)

> warranted and submitted to the jury the question of punitive damages on account of alienation of affections, as distinguished from criminal conversations, the testimony must show that the acts of the defendant in alienating the affection of the spouse were done with malice or that there were circumstances or aggravation. . . .

Bland, 735 So. 2d 420-21 (citing *Walter*, 228 So. 2d at 598)). Since there was no evidence of actual malice as evidenced by actual adultery in *Bland*, the trial court correctly decided that it was not a case warranting punitive damages. However, the case sub judice is substantially different than *Bland*.

purposes of punitive damages as outlined by this Court in other cases.

Under the holding in *Campbell*, Mississippi can punish a defendant for unlawful conduct, which as shown above, adultery clearly is unlawful. A rational basis exists for the punitive damages award. Petitioner Fitch's malicious acts were not private nor consented to by Johnny Valentine. Furthermore, the award of punitive damages in this case was less than one-fifth of the actual damages award, and this minimal award for punitive damages meets the standard announced by this Court in *Campbell.*

CONCLUSION

This Court should deny Jerry Fitch, Sr.'s Petition for Writ of Certiorari. This case only involves state law, and no constitutional issues have been properly raised by the Petitioner Fitch. Therefore, there is no basis for the Supreme Court of the United States to even entertain a Writ of Certiorari by the Petitioner. Additionally, the act of adultery is not protected intimate association, and the award of punitive damages in this case was constitutional.

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In The

Supreme Court of the United States

JERRY FITCH, SR.,

Petitioner,

v.

JOHNNY VALENTINE,

Respondent.

On Petition For A Writ Of Certiorari To The Mississippi Supreme Court

REBUTTAL IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REBUTTAL IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jerry Fitch, Sr., respectfully submits this Rebuttal to Respondent's Brief in Opposition to his Petition for a Writ of Certiorari to review the judgment of the Mississippi Supreme Court in this case.

INTRODUCTION

Respondent's defense of Mississippi's alienation of affection tort, a common law remedy adorned with the imprimatur of public policy and settled practice, is largely beside the point. Petitioner is not asking this Court to drag Mississippi into the twenty-first century through the expedient of review.

"Malicious adultery," the vehicle by which Respondent was awarded over one hundred and twenty thousand dollars,[1] has no reference in the settled law of any jurisdiction, nor even Mississippi. Assuming one can even accomplish such a thing absent assault, it bears pointing out that Mississippi does not even recognize such a "tort." *Saunders v. Alford*, 607 So. 2d

[1] Respondent acknowledges that the jury had already awarded over six hundred thousand dollars in "actual damages" prior to moving to the punitive damage stage. Obviously, the exemplary damage verdict can only be explained by inferring that the jury believed that, in this bifurcated action, their job was accomplished at a prior decisional stage.

1214, 1214 (Miss. 1992) (en banc) (abolishing tort of criminal conversation).[2]

Waiver or exhaustion is not an issue here once the proper scope of this appeal is understood. Petitioner raised the question of punishment for the exercise of his constitutional rights at all stages in the proceedings below, but, in any event, the highest tribunal in Mississippi properly reviewed those challenges in the course of deciding the case on its merits, whether articulated precisely or not. *Brooks v. State*, 209 Miss. 150, 46 So.2d 94 (1950) (Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal).

Ultimately, Respondent's submission points out the pressing need for this Court to provide guidance after *Lawrence*, of the functional parameters of the constitutional rights of privacy and association within the context of consensual intimate relationships disproved by majoritarian consensus.

Courts throughout this country continue to myopically concentrate on the sexual act involved, deriving a rule of decision from the vacuum of inadequate

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[2] That Mississippi continues to criminally proscribe habitual adultery (Miss. Code Ann. § 97-29-1) is also a *non sequitur*. Punishment here was imposed by a civil jury which had already predicated its enormous damage verdict on the intimate association here at issue.

precedent while ignoring the complexities of the human relationships giving rise to the issue.

Petitioner, punished for engaging in consensual sex with his current wife while she was married to another (and former adulterer), seeks the opportunity from this Court for a reasoned approach to the human rights at issue.[3] His predicament is one faced by countless black-mailed others every day in this country. The punishment for "malicious adultery" imposed by a jury enabled by the state, while typically avoided by others less bold, is unconstitutional.

I. Petitioner Is Not Asking The Court To Declare A Constitutionally Protected Right To Commit Adultery

Respondent's reliance on *Caruso v. City of Cocoa*, 260 F. Supp. 1191 (M.D. Fla. 2003) does not support a

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[3] The court in *Bowers* focused primarily on the sexual act at issue rather than other aspects of the consensual relationship. Reference the analytical approach of the court in *Caruso v. City of Cocoa*, 260 F. Supp. 1191 (M.D. Fla. 2003), crucially important to Respondent. Yet, for all that, there remains hope that the judiciary is moving to the proper level of abstraction, consistent with any useful inquiry into the concerns and countervailing considerations involved in litigation over fundamental rights within this arena. *Compare Lawrence v. Texas*, 539 U.S. 558 (2003) and *Shawgo v. Spradlin*, 701 F.2d 470 (5th Cir. 1983) with *Smith v. Price*, 616 F.2d 1371 (5th Cir. 1980) (assuming "for purposes of this discussion that the [extramarital] relationship itself was constitutionally protected"). *See also Shumpert v. City of Fulton*, 1995 WL 1945434 (N.D. Miss.).

conclusion that the Court should not consider this case. First, the Court is, of course, not bound by this decision of a district court in Florida. Second, *Caruso* was decided before *Lawrence* and therefore district court was not bound by that decision. And as Respondent points out, neither case addresses the particular rights raised in this case. Therefore, if anything, Respondent's argument only serves to highlight the need for this Court to provide further guidance as to the constitutionality of punishment for "malicious adultery" in light of *Lawrence* and its antecedents.[4]

In addition, Respondent's argument that *Caruso* is a natural extension of *Lawrence* because the Middle District of Florida applied the historical analysis that the Supreme Court applied to laws directed at homosexual conduct to the laws directed at adultery is simply irrelevant. Petitioner is not seeking to obtain this Court's approval of adultery or even to declare unconstitutional any laws that discourage it. He is simply challenging the state's right to punish certain conduct.

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[4] Respondent's argument that the imposition of punitive damages in this case was lawful because prior Mississippi cases – specifically the 1969 Mississippi Supreme Court case cited by Respondent – have affirmed the imposition of punitive damages for alienation of affection is simply irrelevant. The issue at hand is the *constitutionality* of the imposition of punitive damages for "malicious adultery" has never been addressed in any case cited by Respondent, let alone by this Court.

II. The Relief Sought Would Not Interfere With Mississippi's Interest In Protecting The Institution Of Marriage

Respondent paints an exaggerated and illogical picture of what *might* occur if the Court were to hear this case and reverse the Mississippi Supreme Court's award of punitive damages for alienation of affections. First, Petitioner is seeking a holding that would only declare the Mississippi courts' award of punitive damages for commission of the tort of alienation of affections unconstitutional, not the tort itself. Therefore, there is no danger that a decision in this case would result in the abolition of adultery as a grounds for divorce. Indeed, there are other accepted grounds for divorce, such as impotence and insanity, that do not support the imposition of punitive damages. *See, e.g.*, Miss. Code Ann. § 93-5-1 through 7.

CONCLUSION

For the reasons set forth herein and in Petitioner's Petition for a writ of certiorari, the Court should grant Petitioner a writ of certiorari so that it may consider the question of whether the state of Mississippi, through the guise of its antiquated tort of alienation of affections, can punish a person for engaging in consensual intimate association without

violating his First and Fourteenth Amendment rights.

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